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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1937

## No. 256

STATE OF INDIANA EX REL. DOROTHY ANDERSON, PETITIONER,

*vs.*

HARRY BRAND, TRUSTEE OF CHESTER SCHOOL TOWNSHIP OF WABASH COUNTY, INDIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

PETITION FOR CERTIORARI FILED JULY 27, 1937.

CERTIORARI GRANTED NOVEMBER 15, 1937.

# SUPREME COURT OF THE UNITED STATES

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HARRY BRAND, TRUSTEE OF CHESTER SCHOOL TOWNSHIP OF WABASH COUNTY, INDIANA

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

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[fol. 1] [Caption omitted]

[fol. 2] STATE OF INDIANA,
County of Wabash, ss:

## IN THE WABASH CIRCUIT COURT

APRIL TERM, 1934

[fol. 3] STATE OF INDIANA ON THE RELATION OF DOROTHY ANDERSON

vs.

WALTER E. BOYER, Trustee of Chester School Township of Wabash County, State of Indiana

COMPLAINT—Filed April 16, 1934

The relatrix herein, Dorothy Anderson, complains of said defendant, Walter E. Boyer, Trustee of Chester School Township of Wabash County, State of Indiana, and for cause of complaint alleges:

That plaintiff's relatrix has a teacher's license to teach primary grades in the schools of the State of Indiana, issued to her by the duly contstituted authorities of the State of Indiana, which license is a life license and which was issued on the 15th day of August, 1932.

That in September, 1924, under a contract with Chester School Township of Wabash County, Indiana, this relatrix began to teach primary grades in the school maintained at Servia, Indiana, by said Chester Township of Wabash County, Indiana. That under successive contracts thereafter plaintiff's relatrix taught in the schools of said Chester School Township of Wabash County, State of Indiana, until the year of 1932-1933 continuously and taught more than five years prior to the said school year of 1932-1933. That the contracts for the school year of 1931-1932 and 1932-1933 contained the clause as follows, to-wit:

[fol. 4)] "It is further agreed by the contracting parties that all of the provisions of the Teachers' Tenure Law, approved March 8, 1927, shall be in full force and effect in this contract."

That on the 27th day of July, 1933, said defendant, Walter E. Boyer, was the duly appointed, qualified and acting trustee of Chester School Township of Wabash County, State of Indiana, and on said date notified this relatrix that the matter of the cancellation of her teacher's indefinite contract would be considered as provided by law. That thereafter on the 29th day of July, 1933, this relatrix demanded from said defendant a statement in writing of the reasons for the proposed cancellation of her teacher's contract, and on the 2nd day of August, 1933, said defendant notified her in writing that the reasons for the proposed cancellation of her teacher's contract were as follows: (1) Neglect of duty; (2) Failure to comply with the provisions of law which would entitle her to be classed as a permanent teacher; (3) Present economic conditions demand that her position be given to one who does not have other means of livelihood; (4) Other good and just causes.

That on the 25th day of August, 1933, at two P. M. at the office of said defendant, a hearing was had on said proposed cancellation of this relatrix' indefinite contract. That the only reasons assigned in said hearing by said defendand for the cancellation of the indefinite contract of this relatrix were: (1) That she was a married woman, and (2) That she had violated the rules of the defendant with regard to attendance for duty at eight o'clock A. M. at the school where she was teaching. That there was no rule of that kind and that this relatrix had at all times arrived at the [fol. 5] said school ready for duty before the school convened at eight-thirty A. M. and had at times arrived at said school prior to eight o'clock and sometimes shortly after eight o'clock and had never been notified by said defendant, or by any other person or persons, to be in attendance at said school at eight o'clock in the morning and that the said charge of neglect of duty was founded solely upon the charge that she had not at all times been in the school building where she was teaching and ready for duty at eight o'clock in the morning, one half hour before school convened.

That this relatrix had at numerous times inquired of said defendant, prior to the making of said charge, whether or not there was any complaint or criticism of her work as teacher and that in January, 1933, said defendant told her that she should be at said school for duty at approximately eight o'clock in the morning and that thereafter she com-

plied with said request and received a success grade from the Superintendent of Schools of Wabash County, State of Indiana, for the school year of 1932-1933 of 95%.

That after said hearing on the 25th day of August, 1933, said defendant attempted to cancel the indefinite contract of this relatrix and on the 30th day of August, 1933, wrote to her and stated that he had suspended this relatrix from her duties as a teacher in the schools of Chester Township pending a decision on the cancellation of her contract.

That thereafter, on the 1st day of September, 1933, this relatrix prayed and appeal from the said defendant's decision to Neil M. Good, County Superintendent of Schools [fol. 6] of Wabash County, State of Indiana, and that on the 7th day of September, 1933, was notified by the said Neil M. Good to appear on the 7th day of September, 1933, at four O'clock P. M. for a hearing relative to the cancellation of her indefinite contract. That on the same date the said Neil M. Good as such superintendent notified this relatrix in writing that her indefinite contract had been cancelled for the following reasons: (1) Neglect of duty; (2) That since she was a married lady and had other means of support, he felt that her contract should be cancelled under the part of the statute which reads as follows: "For other good and just cause."

That thereafter this relatrix was permitted to teach in said schools for the year of 1933-1934 under no contract except the indefinite contract which she had theretofore had which entitled her to be a permanent teacher of the schools of said Chester School Township.

That said defendant has stated that he will not reinstate this relatrix as a permanent teacher in the schools of said Chester School Township and that her employment would end at the end of the school year of 1933-1934, which school year ends in April, 1934.

That in truth and in fact there was no reason of any kind or character for canceling the indefinite contract of this relatrix except the reason that she was a married woman and because of political reasons. That there are several teachers teaching at this time in said Chester school Township who are not permanent teachers under the Teachers' Tenure Law. That under the laws of the State of Indiana plaintiff's relatrix is entitled to employment as a permanent [fol. 7] teacher in the schools of Chester School Township of Wabash County, State of Indiana.

Wherefore, plaintiff sues and prays that said defendant be mandated to continue the employment of this relatrix as a teacher in the schools operated by said defendant in Chester School Township of Wabash County, State of Indiana; and for all other relief right and proper.

Plummer & Plummer, Attorneys for Plaintiff.

*Duly sworn to by Dorothy Anderson. Jurat omitted in printing.*

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[fol. 8] IN THE WABASH CIRCUIT COURT

SUMMONS AND SHERIFF'S RETURN

STATE OF INDIANA,
Wabash County, ss:

The State of Indiana to the Sheriff of said County, Greetings; You are commanded to summon Walter E. Boyer, Trustee of Chester School Township of Wabash County, State of Indiana; to appear in the Wabash Circuit Court, before the Judge thereof on the 28th day of April, 1934 then and there to answer the complaint of State of Indiana on the relation of Dorothy Anderson and of this writ make due return.

Witness, the Clerk of said Court and seal thereof hereunto affixed at Wabash, this 16th day of April 1934.

G. H. Arnold, Clerk.

I hereby certify that the above is a true copy of the original summons.

—— ——, Sheriff of Wabash County.

Came to hand April 16, 1934, at 10 o'clock, A. M.

I have served the within summons as commanded, by reading the same to and within the hearing of Walter E. Boyer Trustee of Chester school Township of Wabash County State of Indiana and by leaving a true and certified copy of the within summons at the usual or last place of residence of —— ——, —— —, 193-.

H. L. Shoemaker, Sheriff of Wabash County, H. Farr, Deputy.

[fol. 9] [File endorsement omitted]

IN THE WABASH CIRCUIT COURT

[Title omitted]

SPECIAL APPEARANCE OF DEFENDANT—Filed April 27, 1934

John F. Kelton, attorney for the above named defendant, Walter E. Boyer, Trustee of Chester School Township, hereby enters his special appearance for said defendant in said cause.

John F. Kelton, Attorney for Deft.

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[fol. 10] IN THE WABASH CIRCUIT COURT

[Title omitted]

RULE TO ANSWER—May 2, 1934

Now to-wit: The said defendant is ordered, ruled to answer the complaint fifth Monday being May 7th, 1934.

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[fol. 11] IN THE WABASH CIRCUIT COURT

[Title omitted]

DEMURRER—Filed May 7, 1934

The defendant, Walter E. Boyer, Trustee of Chester School Township, demurs to the plaintiff's complaint and says that said complaint does not state facts sufficient to constitute a good cause of action.

John F. Kelton, Attorney for Defendant.

Memoranda

1. Plaintiff's complaint shows on its face that the matters therein pleaded were submitted to the Township Trustee in said Township, and by him determined in favor of the defendant; that an appeal from the findings and order made by said Township Trustee in said cause was taken by the relatrix herein to Neil M. Good, County Superintendent,

who then and there had jurisdiction to try said cause, and said County Superintendent determined said cause in favor of the defendant, and it is nowhere alleged or shown by the complaint herein that there was any bad faith, corruption, fraud or gross abuse of discretion on the part of the Township Trustee or said County Superintendent in the hearing and trial of said cause.

2. That the complaint shows that the action is based upon Section One of an Act of the Legislature of the State of Indiana, approved March 8, 1927, which said Statute was [fol. 12] repealed by the Legislature of the State of Indiana in so far as it applied to school teachers' tenure law in townships in said state.

3. That the plaintiff's action is founded upon a Statute which has been repealed by the Legislature of the State of Indiana, and there was not, at the time of the filing of this suit, any law in force in said state of Indiana under which this action can be maintained.

John F. Kelton, Attorney for Defendant.

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[fol. 13] IN THE WABASH CIRCUIT COURT

[Title omitted]

DEMURRER—Filed May 25, 1934

The defendant, Walter E. Boyer, Trustee of Chester School Township, demurs to the plaintiff's complaint and says that said complaint does not state facts sufficient to constitute a good cause of action.

John F. Kelton, Attorney for Defendant.

Memoranda

1. Plaintiff's complaint shows on its face that the matters therein pleaded were submitted to the Township Trustee in said Township, and by him determined in favor of the defendant; that an appeal from the findings and order made by said Township Trustee in said cause was taken by the relatrix herein to Neil M. Good, County Superintendent, who then and there had jurisdiction to try said cause, and said County Superintendent determined said cause in favor of the defendant, and it is nowhere alleged

or shown by the complaint herein that there was any bad faith, corruption, fraud or gross abuse of discretion on the part of the Township Trustee of said County Superintendent in the hearing and trial of said cause.

[fol. 14] 3. That the plaintiff's action is founded upon a Statute which has been repealed by the Legislature of the State of Indiana, and there was not, at the time of the filing of this suit, any law in force in said state of Indiana under which this action can be maintained.

John F. Kelton, Attorney for Defendant.

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In Wabash Circuit Court

[Title omitted]

Order Sustaining Demurrer—October 24, 1934

Come the parties by counsel, and the demurrer to the Complaint is sustained by the court, to which ruling of the court the plaintiff excepts, and said plaintiff refuses to plead further and judgment is now rendered against plaintiff upon demurrer.

It is, therefore, considered, adjudged and decreed by the court that the plaintiff take nothing by this action and costs are taxed against the plaintiff. And said plaintiff prays an appeal to Supreme Court of Indiana, which appeal is granted by the court.

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[fol. 15] In the Wabash Circuit Court

[Title omitted]

Petition to Substitute Defendant—Filed April 5, 1935

[fol. 16] The relatrix herein, Dorothy Anderson, being duly sworn upon her oath says:

That the above cause of action is an action to mandate the Trustee of Chester School Township of Wabash County, State of Indiana, to continue the employment of this relatrix as a teacher in the schools of said Chester School Township.

That at the time this action was brought and thereafter until the first day of January, 1935, Walter E. Boyer, the defendant above named, was Trustee of Chester School Township of Wabash County, State of Indiana.

That his term of office expired on the 31st day of December, 1934, and that Harry Brand is now the duly elected qualified, and serving Trustee of Chester School Township of Wabash County, State of Indiana.

That said action was an action against the said Walter E. Boyer in his official capacity as said trustee of said township.

That judgment was entered against this relatrix in said cause in the Wabash Circuit Court of Wabash County, State of Indiana on the 24th day of October, 1934, from which judgment this relatrix prayed an appeal to the Supreme Court of the State of Indiana.

That the said Harry Brand, Trustee of Chester School Township of Wabash County, State of Indiana, should be substituted as party defendant in said action in order that this relatrix may have a full and complete determination of her cause of action on appeal to the Supreme Court of the State of Indiana.

[fol. 17] Wherefore, this relatrix asks an order of court substituting Harry Brand Trustee of Chester School Township of Wabash County, State of Indiana, as party defendant herein after due notice given.

Dorothy Anderson.

Subscribed and sworn to before me this 4th day of April, 1935. F. W. Plummer, Notary Public. My comm. exp. January 7, 1939.

The Clerk of Wabash Circuit Court shall issue notice to the Sheriff of Wabash County for Harry Brand, Trustee of Chester Township of Wabash County, State of Indiana, Returnable April 16, 1935.

Plummer & Plummer, Atty, for Plaintiff.

IN THE WABASH CIRCUIT COURT

[Title omitted]

NOTICE OF PETITION TO SUBSTITUTE PARTY DEFENDANT—
Filed April 5, 1935

To Harry Brand, Trustee of Chester School Township of Wabash County, State of Indiana:

[fol. 18] You are hereby notified that the relatrix in the above entitled cause of action, Dorothy Anderson, has filed her petition in the Wabash Circuit Court of Wabash County, State of Indiana asking that you be substituted as party defendant in the above entitled cause of action.

You are fu-there notified that said petition will be heard by the Wabash Circuit Court of Wabash County, State of Indiana on the 16th day of April, 1935, in the Court House in the City of Wabash, Indiana, of which you will take due notice.

Dated this 5th day of April, 1935.

Grover H. Arnold, Clerk of the Wabash Circuit Court.

Came to hand April 5th, 1935. Served by reading and leaving a copy with Harry Brand, April 5th, 1935.

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H. L. Shoemaker, Sheriff, by Harry Farr, Deputy.

[File endorsement omitted.]

[fol. 19] IN WABASH CIRCUIT COURT

[Title omitted]

ORDER SUBSTITUTING DEFENDANT—April 16, 1935

Comes now the plaintiff by counsel and files proof of service of notice to substitute defendant, which proof is copied heretofore. And said petition to substitute party defendant is now submitted to the court and evidence is heard, and the court being advised in the premises finds for the petitioner, that Harry Brand, trustee of Chester School Township of Wabash County, State of Indiana, be and is hereby substituted as defendant herein.

It is, therefore, considered, adjudged, and ordered by the court that said Harry Brand, trustee of Chester School Township of Wabash County, State of Indiana be and is hereby substituted as defendant herein.

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[fol. 20] IN THE WABASH CIRCUIT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Wabash Circuit Court, Wabash County, State of Indiana:

You are hereby directed to prepare a transcript of the record for an appeal to the Supreme Court of Indiana, in cause #5342 in the Circuit Court of said county of Wabash, State of Indiana, entitled State of Indiana on the relation of Dorothy Anderson vs. Harry Brand, Trustee of Chester School Township of Wabash County, State of Indiana, in whose place and stead Harry Brand, Trustee of Chester School Township of Wabash County, State of Indiana has been substituted by order of the Wabash Circuit Court as party defendnat in which cause final judgment on October 24, 1934 and to include therein the following:—The transcript of the entire record.

Dorothy Anderson, Relatrix, by Plummer and Plummer, Her Attorneys.

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[fol. 21] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 22] IN SUPREME COURT OF INDIANA

No. 26560

Appeal from Wabash Circuit Court

STATE OF INDIANA ex Rel. DOROTHY ANDERSON

vs.

HARRY BRAND, Trustee of Chester School Township, etc.

JOURNAL ENTRIES

1935, Apr. 18. Record Assgt. of Error. Præcipe for Notice.

1935, May 18. Submitted &c.

1935, July 13. Appellant's pet. for time.

1935, July 15. Appellant's pet. for time granted to and inc. Sept. 3, 1935.

1935, Aug. 31. Appellant's pet. for time, notice & consent.

1935, Sept. 3. Appellant's pet. for time, granted to and inc. Oct. 3, 1935.

1935, Oct. 2. Appellant's brief (10).

1935, Nov. 1. Appellee's pet. for time granted to and inc. Dec. 4, 1935.

1935, Dec. 4. Appellee's brief (10).

1937, Jan. 14. 45th Day Nov. Term—Affirmed Fansler, J. —Treanor, J.—dissents.

1937, Feb. 2. 61st Day Nov. Term—Dissenting opinion by Treanor, J.

1937, Mar. 13. Appellant's pet. for rehearing & brief (10).

1937, Mar. 15. Appellant's amendment to appellant's pet. for rehearing, etc.

1937, Mar. 20. Appellee's pet. for leave to file brief in opposition to pet. for rehearing.

1937, Mar. 22. Appellee's petition for leave to file brief granted, brief to be filed on or before Apr. 5, 1937.

1937, Apr. 5. Appellee's brief (10) opposing appellant's pet. for rehearing.

[fols. 23-24] 1937, Apr. 7. Petition of counsel for Indiana State Teachers Assn. for leave to file brief amici curiæ.

1937, Apr. 8. Pet. of counsel for Ind. Teacher Ass'n for leave to file brief amici curiæ granted.

1937, Apr. 9. Brief (10) of counsel for Ind. State Teachers Federation of Indiana.

1937, Apr. 10. Appellee's motion to deny petition of Ind. State Teachers Ass'n to file brief amici curiæ.

1937, April 27. Appellant's pet. for rehearing, denied with opinion by Fansler, J.; Treanor, J. dissents.

1937, June 23. Memorandum of court concerning opinion.

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[fol. 25] IN THE SUPREME COURT OF INDIANA

[Title omitted]

ASSIGNMENT OF ERROR—Filed April 18, 1935

The Appellant says there is manifest error in the judgment and proceedings prejudicial to Appellant in this cause in this:

1. The Court erred in sustaining Appellee's demurrer to Appellant's complaint.

Plummer & Plummer, Attorneys for Appellant.

[File endorsement omitted.]

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[fol. 26] IN SUPREME COURT OF INDIANA

[Title omitted]

JUDGMENT—January 14, 1937

Come now the parties by counsel and the Court, being advised in the premises, affirms the judgment of the court below with the following opinion pronounced by. Fansler, J. (H. I.). Treanor J dissenting.

It is therefore considered by the Court that the judgment of the court below in the above cause be in all things affirmed at the cost of appellant.

And it is further considered and adjudged by the Court that the appellee recover of the appellant the sum of $— for — costs in this behalf expended.

[fol. 27] IN THE SUPREME COURT OF INDIANA

[Title omitted]

OPINION.—January 14, 1937

FANSLER, J.:

By this action it is sought to mandate appellee to continue relatrix in the employ of the township as a school teacher under the Act of 1927 (Acts 1927, c 97; p. 259), which provides that a person who has served for five or more successive years as a teacher, and shall thereafter enter into a contract for further service, shall become a permanent teacher. The act was amended in 1933 (Acts 1933, c. 116, p. 716, Burns' Ann. St. 1933, § 28-4307), and made to apply to city and town school corporations only. Townships, to which the act originally applied, were omitted in the amendment, which had the effect of repealing the law so far as township schools, and the teachers therein are concerned.

A demurrer to the complaint was sustained. The relatrix contends that this was error; that, having become a permanent teacher under the Teachers' Tenure Law before the amendment, she had a vested property right in her indefinite contract, which may not be impaired under the Constitution. The question is whether there is a vested right in a permanent teacher's contract; whether, under the tenure law, there is a grant which cannot lawfully be impaired by a repeal of the statute.

[fol. 28] The establishment and maintenance of public schools is a governmental function, jurisdiction over which vests in the General Assembly, whose power, subject to constitutional limitation, is plenary, and whose discretion is not reviewable. This legislative power is not exhausted by exercise, and schools may be continued or discontinued, and the school system changed, or one system substituted for another, as often as the Legislature may deem it necessary or advisable in the public interest. Follett v. Sheldon, Treas. (1924) 195 Ind. 510, 144 N. E. 867. In establishing schools and enacting laws for their regulation, and in licensing teachers and providing for their tenure, the General Assembly acts for the benefit of the public, and not for the benefit of the teachers. In a case in which it was contended that a provision of the statute, providing for the

revocation of teachers' licenses by the county superintendent, was unconstitutional for the reason that there was a vested property right in the license, this court said:

"It must be remembered that the establishment and regulation of public schools rests primarily with the legislative department, and the constitutional provisions invoked by appellee were not designed to trammel the State in the exercise of its general political powers, or to impose upon the courts the duty of interposing between the legislature and the citizens in matters of purely governmental concern. * * * A license has none of the elements of a contract, and does not confer an absolute right, but only a personal privilege to be exercised under existing restrictions and such as may thereafter be reasonably imposed. Statutes authorizing the issuance of such licenses are en- [fol. 29] acted to promote the good order and welfare of the State, and may ordinarily be repealed at the pleasure of the legislature. (Authorities.)

"In the case of Doyle v. Continental Ins. Co. (1876) 94 U. S. 535, 540, 24 L. Ed. 148, the Supreme Court of the United States, in speaking of licenses, said: 'The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a state is always revocable.' " Stone, Supt., v. Fritts (1907) 169 Ind. 361, 364, 365, 82 N. E. 792, 794.

The tenure law does not purport to give a teacher a definite and permanent contract. The word "indefinite" is used in the statute itself. The contract is variable as to compensation, and the tenure is permanent only in the event that it is not necessary to reduce the number of teachers. In effect therefore it gives the tenure teacher preferential rights over the teachers who have not attained a tenure status. If the purpose of this statute had been the granting of special privileges to certain teachers for their own benefit, its constitutionality would be seriously in question. But its enactment can be justified upon the theory that its purpose is to promote good order and the welfare of the state and of the school system by preventing the removal of capable and experienced teachers at the political or personal whim of changing officeholders. A future General Assembly may favor a policy of constant change of teachers. The courts are powerless to prevent such a change. Each succeeding Legislature is free and untram-

meled in its right to change governmental policy. The revocation of a tenure teacher's license would, of course, [fols. 30-31] carry with it the indefinite contract. The contract, like the license upon which it rests, is a privilege granted by grace of the sovereign for the purpose of promoting the good order and welfare of the state. The license is broader in its bearing than the contract. Without the license a tenure contract cannot exist. Since there is legislative power to revoke the license and thus destroy the contract, there must necessarily be power to do the lesser thing, and merely revoke the tenure contract without canceling the license. The tenure statute was only intended as a limitation upon the plenary power of local school officials to cancel contracts. Ratcliff v. Dick Johnson School Twp. (1933) 204 Ind. 525, 185 N. E. 143. It was not intended as, and cannot be, a limitation upon the power of future Legislatures to change the law respecting teachers and their tenures. These are matters of public policy, of purely governmental concern, in which the legislative power cannot be exhausted or consumed, or contracted away, so as to limit the discretion of future General Assemblies. The repeal of the statute, in so far as it affects townships and township schools, removes the restriction upon the power of the school corporation so far as it affects the preferential or so-called tenure rights of teachers, and leaves the township officers free to renew teachers' contracts or not as may be deemed expedient.

Judgment affirmed.

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[fol. 32] [Title omitted]

DISSENTING OPINION—Filed February 2, 1937

TREANOR, J., dissenting.

I cannot agree with the reasoning and result reached by the majority of the Court for two reasons.

(1) The 1933 Amendment to the Teachers' Tenure Act should be given a prospective effect in accordance with the well recognized rule that statutes "are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect be clearly intended."[1]

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[1] Maxwell, Interpretation of Statutes, 7th Ed. p. 186.

(2) If, in order to give effect to legislative intent, the 1933 Amendment must be construed to operate retrospectively the legislative enactment violates the inhibitions of the United States Constitution and the Indiana Constitution against impairment of contracts.

No rule of statutory interpretation is more generally taken for granted than the rule that statutes will be treated as prospective rather than retrospective. Such a rule is supported by a sense of justice and fair dealing and is in accord with the elementary distinction between judicially and legislatively declared rules. Normally a legislatively declared rule applies to future conduct; while a judicially declared rule governs past as well as future conduct. Consequently when a statute attaches certain legal consequences [fol. 33] to certain stated conduct, no court would tolerate the suggestion that such consequences would attach to conduct which occurred prior to the effective date of the statute, unless the statute requires such retroactive effect either by express provisions or by necessary implication.

The English cases consistently give effect to the presumption that statutes operate prospectively rather than retrospectively; and these cases emphasize the inherent validity and justice of the presumption since the English courts are under no constitutional pressure to deny a retroactive effect to statutes in order to avoid a construction which would render the statute invalid because of violation of a constitutional inhibition against impairment of contract. It is stated in the leading English authority on interpretation of statutes that "it is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication."[2] The foregoing rule is supported by the following statement of a leading English case. "No rule of construction is more firmly established than this: that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly

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[2] Maxwell, Interpretation of Statutes, 7th Ed. p. 186.

capable of either interpretation, it ought to be construed as prospective only."[3]

The statements of American courts are substantially the same as those of the English courts. It is stated in Lewis' [fol. 34] Sutherland Statutory Construction that "The general rule is that statutes will be construed to operate prospectively only, unless an intent to the contrary clearly appears."[4] In support of the foregoing statement numerous excerpts of decisions of state courts are quoted; of which excerpts the following is typical: "The rule is that statutes are prospective, and will not be construed to have retroactive operation unless the language employed in the enactment is so clear it will admit of no other construction."[5]

The objections which are urged against retrospective operation of a new statute apply with equal validity to the repeal of a statute when a retrospective operation would have the effect of destroying legally protected interests which have been created by operation of the statute. "A law can be repealed by the law-giver; but the rights which have been acquired under it while it was in force do not thereby cease. It would be an act of absolute injustice to abolish with a law all the effects which it had produced."[6] Consequently in the case of a repeal of an existing statute,

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[3] Quoted from Athlumney, In re (1898) 2 Q. B., Wright, J. at pp. 551-552.

Quoting from Maxwell on Interpretation of Statutes at page 187. "It is chiefly where the enactment would prejudicially affect vested rights, or the legality of past transactions, or impair contracts, that the rule in question prevails. Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the Legislature, to be intended not to have a retrospective operation."

[4] Sec. 642, p. 1157.

[5] Quoted from Bauer Grocer Co. v. Zelle, 172 Ill. 407, 50 N. E. 238.

[6] Lewis' Sutherland Statutory Construction, 2d Ed. p. 547.

the same as in the case of an enactment of a new statute, courts have assumed that the legislative intent was not to give a retrospective operation, unless the contrary was clearly indicated by the terms of the repealing act.

By the terms of the Teachers' Tenure Act of 1927 (Acts. 1927, c. 97, p. 250) township school corporation were included within its scope; and the 1933 Amending Act, (Acts 1933, c. 116, p. 716) excludes township school corporations merely by omitting the words "any school corporation" and substituting therefor "any school city corporation or * * * any school town corporation." There is nowhere in the Amending Act of 1933 any express declaration of an intention of the General Assembly to give the Amending Act retrospective effect.

[fol. 35] The General Assembly enacted the repealing act with knowledge that this Court follows the rule that statutes are presumed to operate prospectively rather than retrospectively; and this Court should assume that the legislative intent was for this presumption to prevail, since nothing to the contrary appears in the Act. And since there appears to be no reason why the constitutionality of the Amending Act would be imperiled by construing it to operate prospectively only, this Court is under no compulsion to construe it to operate retrospectively in order to save its constitutionality. Consequently, this Court, being under no compulsion to favor retrospective operation, is under a compulsion to follow the general rule that a statute should be construed to operate prospectively in the absence of any indication in the Act itself of the legislative intention that it operate retrospectively.

In accordance with the foregoing it is my belief that the Amending Act of 1933 should be construed to operate prospectively, and to leave unimpaired the rights and privileges of township teachers which were acquired under their indefinite contracts prior to the effective date of the Amending Act of the 1933 General Assembly.

But if the Amending Act must be construed to operate retrospectively, I am of the opinion that it violates Article 1, Sec. 24 of the Indiana Constitution, and Article 1, Sec. 10 of the Federal Constitution.

Prior to the enactment of the Teachers' Tenure Act of 1927 the employment relationship between a school corporation and a teacher was created and governed by a contract,

and was legally binding upon both teacher and school corporation. The ordinary contract was for a fixed period; [fol. 36] usually for a single term of school. In view of numerous decisions of the Supreme and Appellate Courts of this State it is clear that such a contract carried with it all the rights and duties of contract generally. Since such contracts were for personal services the only remedy which a teacher had in case of breach of contract by the school corporation was to sue for damages. In such a suit the usual rules regulating recovery of damages for breach of contract were applied by the courts. While it was often said that a school corporation could dismiss a teacher for cause, this necessarily could have meant, under the decided cases, only that a school corporation could abrogate its contractual relations with the teacher if the teacher was unable or unwilling to substantially perform his contract. This was merely an application of the general rule that one party to a contract can rescind in case of failure of performance by the other party.

The Tenure Act did not change the method of creating the employer-employee relationship between school corporations and teachers, but only changed the incidents of the contract which creates the relationship. As long as the contract which creates the employer-employee relationship between a school corporation and a teacher has not ripened into an indefinite contract, the school corporation can repudiate the contract and the only recourse that the teacher has is to sue for damages. But Section 1 of the Act of 1927, supra expressly provides that an indefinite contract "shall remain in force unless succeeded by a new contract signed by both parties or unless it shall be cancelled as provided * * *" in the act. This deprives the school corporation of the legal power to repudiate indefinite contracts of em- [fol. 37] ployment with permanent teachers and gives to the teacher the legal right to continue in the employer-employee relationship with the school corporation under the terms and conditions of the indefinite contract. The legal result is that the teacher has a legally protected tenure of position until the same is terminated in accordance with the provisions of the statute.

When a court of competent jurisdiction decides that a school corporation unlawfully has declared the cancellation of an indefinite contract, the factual and legal result is that the indefinite contract has not been cancelled, but is in full

force and effect. And when the court further adjudges that the order purporting to cancel the contract should be set aside, and that the teacher should be reinstated in her position, the factual consequence is that the school corporation is being compelled specifically to perform its contract to continue the teacher in the employer-employee relationship.

In short, under an indefinite contract, a permanent teacher enjoys a legally enforceable right to be continued in his position as a teacher. This right is of equal validity with the right to recover damages for breach of a non-tenure contract; and is equally the creation of a contract. There are at present thousands of teachers in Indiana who have not become permanent teachers under an indefinite contract but are employed under a contract for a definite period of service. If the present General Assembly should decide to change the policy of authorizing school corporations to contract with teachers and to substitute the policy of appointing teachers at pleasure; and in pursuance of that policy should deprive school corporations of the power [fol. 38] to enter into contracts of employment with teachers; and should further provide that all contracts heretofore entered into should be abrogated, it is not conceivable that such action could deprive a non-tenure teacher of his right to recover damages for breach of contract in case his employing school corporation, acting under such statute, should refuse to carry out the existing contract of employment in accordance with its terms. It seems to the writer equally inconceivable that the General Assembly can abrogate an existing indefinite contract and thereby destroy the valid legally enforceable right of tenure which is a legal incident of the contract; and which, as above pointed out, is as essential an element of the indefinite contract as the right to recover damages is of a non-tenure contract.

The majority opinion assumes that the legal quality of the so-called "indefinite" contract is vitiated by its indefiniteness. But it is indefinite only in respect to the life of the contract, which is not limited to a definite and fixed period of time, although the Act provides for a definite method of ending the contract relation. At any particular time in the life of the contract all the terms which affect its performance are definite. It is true that provision is made in the statute for changes by mutual consent of school corporation and teacher, and for some changes without the

consent of the teacher. But many contracts between private persons have provisions which authorize change in the manner and time of performance, and it has never been supposed that such provisions affect the legal quality of the contract. The contractual relationship which arises as a result of the mutual agreement of the parties remains legally unimpaired, although the mutual obligations of the [fol. 39] parties may have been varied by modification of the original terms and conditions of the contract. And if we grant that the General Assembly has the constitutional power to authorize school corporations and teachers to enter into a contractual relationship of indefinite duration, it necessarily follows that the fact of indefiniteness of duration can not, in and of itself, qualify the contractual rights of the contracting parties. The only purpose and effect of the statutory requirement that the contract should continue for an indefinite period of time is to avoid setting an arbitrary limit to the time element of tenure. Instead of authorizing and requiring an indefinite contract the General Assembly might have provided that the last contract of the probationary period of service should continue for ten years; in which case the legally enforceable period of tenure would be definitely limited to ten years. Whether tenure is protected and made legally enforceable for an indefinite period of time, or only for a fixed and definite period of time, can make no difference in the legal quality of the contract.

Numerous decisions of this Court support the following statement in the majority opinion: "The establishment and maintenance of public schools is a governmental function, jurisdiction over which vests in the General Assembly, whose power, subject to constitutional limitation, is plenary, and whose discretion is not reviewable. This legislative power is not exhausted by exercise, and schools may be continued or discontinued, and the school system changed, or one system substituted for another, as often as the Legislature may deem it necessary or advisable in the public interest." But the foregoing does not validate the conclusion that the General Assembly can destroy the legal consequences of acts which have been performed under the sanction of statutes which have been enacted [fol. 40] for the purpose of giving effect to a legislative policy respecting the school system of the state. If the method or system devised by the General Assembly for the

purpose of carrying out its educational policies includes the creation of contractual relations between the state, or its sub-divisions, and private persons, it does not follow that the repeal of the statute which authorized such contractual relations destroys the rights of private persons who have entered into contracts with the state or its local agencies. This is pointed out in the following excerpt from an opinion of the Supreme Court of Wisconsin:[7] "In State ex rel. Mayor, etc., decided herewith (189 Wis. 84, 206 N. W. 210), it is held that the entire field of education in this state is one of state affairs and regulations rather than one belonging to the local affairs or government of municipalities. Evidently, therefore, when the State by the law of 1921 expressly required (although undoubtedly the same effect would have been reached by its other provisions were such precise provisions omitted) that the State on the one hand and the teachers complying with the law on the other should come under certain fixed contractual obligations, the State cannot now lawfully withdraw or be relieved from such obligations by subsequent legislation.

"One engaging in teaching in this state and whose services are to be paid for in whole or in part by the state school fund is not a public officer and his valid contracts cannot lawfully be destroyed or impaired by subsequent legislation, because such contracts are within the protection of sec. 12, art. 1, Wisconsin constitution, prohibiting the passage of any law impairing the obligation of contracts, as well as by sec. 10, art. 1 of the constitution of the United States, prohibiting any state from passing any [fol. 41] such law."

The majority opinion assumes that the General Assembly has the power to revoke all licenses of teachers and that the revocation of tenure teacher's licenses "would of course carry with it the indefinite contract." The opinion continues as follows: "The contract, like the license upon which it rests, is a privilege granted by grace of the sovereign for the purpose of promoting the good order and welfare of the state. The license is broader in its bearing than the contract. Without the license a tenure contract cannot exist. Since there is legislative power to revoke the license and thus destroy the contract, there must neces-

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[7] State ex rel O'Neil v. Blied, 188 Wis. 442 (1925).

sarily be power to do the lesser thing, and merely revoke the tenure contract without cancelling the license."

Granting that the General Assembly can revoke all existing licenses and that such action would make ineffective all present contracts of teachers, it does not follow that the General Assembly can abrogate all existing contracts, without revoking all licenses. The decided cases which have held that a "mere license" is revocable have all pointed out that "A license has none of the elements of a contract, and does not confer an absolute right, but only a personal privilege to be exercised under existing restrictions and such as may thereafter be reasonably imposed."[8] Revoking a license does not offend against the state and federal constitutional prohibition against impairment of contract; and while it is true that neither a tenure contract, nor a non-tenure contract, can exist between one who is not licensed to teach and a school corporation, yet the fact remains that at the effective date of the repeal act of 1933 the General Assembly had not revoked licenses and the contracts affected by the repeal were existing and valid contracts.

[fol. 42] It is stated in the majority opinion that "The tenure statute was only intended as a limitation upon the plenary power of local school officials to cancel contracts." The foregoing statement is not justified by the decisions of this Court if it must be understood to imply that prior to enactment of the Tenure Act school officials had plenary power to abrogate contractual obligations. Prior to the enactment of the Tenure Act the school officials did have full discretion in the selection of teachers from among qualified applicants; and at the expiration of the usual one school-term contract the school corporation was under no legal obligation to re-employ any particular teacher under a new contract. But school officials have not had at any time plenary power to cancel contracts in the sense that they could end legal liability thereunder.

I can not agree with the implications of the statement in the majority opinion that "The contract, like the license upon which it rests, is a privilege granted by grace of the sovereign for the purpose of promoting the good order and welfare of the state." In a sense all contractual relation-

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[8] Stone v. Fritts, (1907) 169 Ind. 361, p. 365.

ship is by the grace of the sovereign, because it is only by grace of the sovereign that the law attaches legally enforceable rights and duties to voluntary agreements which are denominated contracts. And in the case of indefinite contracts between school corporations and teachers it is the voluntary mutual consent of the parties that creates the contractual relationship, although the legal incidents of the relationship are determined by the terms of the statute which authorizes and governs that particular class of contracts. But such a contract is no more "a privilege granted by grace of the sovereign" than is a contract of sale and purchase of a parcel of land.

[fol. 43] It is evident that the purpose of the indefinite contract provisions of the Act of 1927 was to give to indefinite contracts the legal quality of the ordinary teacher contracts which provide for a definite term of service. And this Court has held that one who had become a permanent teacher under an indefinite contract with a township school corporation had acquired a right to hold his teaching position until the indefinite contract should be cancelled in accordance with the provisions of the Act of 1927, and that this right was legally enforceable. Compensated employment is surely a thing of value; and a legally enforceable right to be continued in such employment for even a short period of time is such a vested interest that it cannot be destroyed or impaired by subsequent legislation, even though it is enjoyed under a contract which has been authorized for the public interest.

The school code of California has contained permanent tenure provisions for many years, and the Supreme Court of that state has discussed at length many of the problems involved in the application of the various tenure provisions; and has declared unequivocally that a tenure teacher enjoys vested rights which cannot be taken away by subsequent legislation. The view of the California court is clearly indicated by the following excerpts from its opinions:

"Assuming that petitioner automatically attained permanent tenure prior to August 14, 1931, at which time the repeal of sections 5.500 to 5.502 of the School Code, as they then existed, occurred, that status was not lost by virtue of failure on the part of the Legislature to adopt, as part of the repealing act, a saving clause." Gastineau v. Meyer, 131 Cal. App. 611; 22 P. (2d) 31, 33.

[fol. 44] "Moreover, the last-mentioned section was enacted after the petitioner in this case had acquired permanent tenure by operation of law, and for that reason it could in no way affect his vested right to the enjoyment of that status." Id. p. 34.

"The language of this subdivision has remained substantially the same from its enactment in 1881 to its repeal by the School Code of 1929 (St. 1929, p. 303, § 10.3). Anderson v. Board of Education, 126 Cal. App. 514, 516, 15 P. (2d) 774, 16 P. (2d) 272. Of course, any tenure previously acquired by respondent was a vested right and remained unaffected by such repeal. Gastineau v. Meyer, 131 Cal. App. 611, 22 P. (2d) 31. In fact, section 5 of the preliminary provisions of the 1929 School Code (St. 1929, p. 1) recognized and continued previously acquired tenure."

Klein v. Board of Education, (1934) 37 P. (2d) 74, 75.

It is not clear that the Supreme Court of California entirely relied upon the rule that tenure rights can not be divested by act of the Legislature in deciding the cases in which the language above quoted was used. But the court clearly recognized the legal soundness of the rule that tenure rights are vested and are immune from legislative impairment.

The opinion of the Wisconsin Supreme Court in State ex rel O'Neil v. Blied, supra, has been referred to, and quoted from, and this case was cited in a later decision of the Wisconsin Court[9] as holding "That the status of one permanently employed as a teacher under such a system and with the rights so fixed cannot be impaired by subsequent legislation."

[fol. 45] In Hall v. Wisconsin[10] the Supreme Court of the United States considered a situation which does not seem to differ in its merits from the instant case. By Act of the Wisconsin Legislature Hall and two others had been appointed "commissioners" to make a "geological, mineralogical and agricultural survey of the state". By the terms

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[9] State ex rel Nyberg v. School Directors (1926) 190 Wis. 570-575.

[10] 103 U. S. 5.

of the Act the governor was required to enter into a written contract with each commissioner. The governor was authorized to fill vacancies in the commission and "to remove any member for incompetency or neglect of duty." On the 29th day of May, 1858, Hall entered into a contract with the governor which bound Hall to perform his duties; and it was stipulated that the contract should "continue till the third day of March, 1863, unless the said Hall should be removed for incompetency or neglect of duty, * * * or unless a vacancy shall occur in his office by his own act or default.'"

"On the part of the State it was stipulated 'that the said Hall shall receive for his compensation and expenses, including the expense of his department of said survey, at the rate of $2,000 per annum. * * * Provided, that for such time as said Hall or his assistants shall not be engaged in the prosecution of his duties, according to the terms of said act and of this contract, deduction shall be made, pro rata, from the sum of his annual compensation and expenses.'"

By a subsequent Act of March, 1862, Act of 1856 providing for the survey and appointing Hall a commissioner, and a later Act of 1860 relating to the commission were repealed without qualification. Hall sued to recover for his services from March 1862 to March 3, 1863. The views of the United States Supreme Court, which seem applicable to the present case, are fully disclosed by the following excerpts from the opinion:

[fol. 46] "In a sound view of the subject it seems to us that the legal position of the plaintiff in error was not materially different from that of parties who, pursuant to law, enter into stipulations limited in point of time, with a State, for the erection, alteration, or repair of public buildings, or to supply the officers or employes who occupy them with fuel, light, stationery, and other things necessary for the public service. The same reasoning is applicable to the countless employes in the same way, under the national government.

"It would be a novel and startling doctrine to all these classes of persons that the government might discard them at pleasure, because their respective employments were public offices, and hence without the protection of contract rights.

"It is not to be supposed that the plaintiff in error would have turned his back upon like employment, actual or potential, elsewhere, and have stipulated as he did to serve the State of Wisconsin for the period named, if the idea had been presented to his mind that the State had the reserved power to break the relation between them whenever it might choose to do so. Nor is there anything tending to show that those who acted in behalf of the State had any such view at that time. All the facts disclosed point to the opposite conclusion as to both parties."

I do not understand the decision in this case to be placed upon the ground that the abrogation of the indefinite contract was within the police power, although the appellees in State ex rel. Jones v. Kerr, Trustee, No. 26621 urge that "If the social interest in freedom from permanent contracts in public child education or in the township govern- [fol. 47] ment is paramount to the social interest in permanent contracts for public school teachers, the Legislature in the proper exercise of the police power of the State, may repeal such contracts." The Supreme Court of Indiana and the Supreme Court of the United States recognize that contractual obligations are subject to the police power. But to uphold such legislative subjection in any particular instance courts must be able to say that a vital social interest is protected by the subjection; and that such interest is paramount to "the social interest of the individual in the security and integrity of contractual relations into which he has entered, or the social interest in the general

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[11] Willis, Constitutional Law, p. 745.

"This social interest is really two social interests: first, the social interest in the performance of a contract by a promisor; * * * The first social interest was one of the most important recognized by the common law and was protected by the law of trusts and by what is known as the law of contracts, both of which have been constantly growing and enlarging in scope throughout the centuries. * * *

"The social interest in promised advantages recognized by the common law also received express recognition in the United States Constitution in the clause forbidding the states to impair the obligation of a contract * * * The due process clause, as we have already seen in this chapter,

security of legal transactions.''[11] Furthermore, in the instant case, it would be unreasonable for this Court to assume that public health, morals, safety or even the indefinite general welfare is promoted by eliminating township school corporations and their teachers from the tenure policy in view of the retention of that policy by the General Assembly for city school corporations and town school corporations; and especially since this Court has declared that the Teachers' Tenure Act is based upon the public policy of protecting the educational interests of the state and that the act should be construed liberally to affect its general purpose since it is legislation in which the public at large is interested.[12]

The indefinite contract between appellant-relator Dorothy Anderson and Chester School Township was a valid, existing contract at the effective date of the Amending Act of 1933; and by virtue of that contract the relator had acquired the legally enforceable right to be continued in her position of teacher in the schools of Chester School Town-
[fols. 48-49] ship. And in my opinion the Amending Act, under the construction placed upon it by the majority decision, violates Article 1, Sec. 24 of the Indiana Constitution and Article 1, Sec. 10 of the Federal Constitution. ''The law, under which the contract was executed, is to be and remain the only rule by which the contract shall be construed. The obligations shall not be increased, nor the rights diminished, by any Act of future legislation.''[13]

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has also been extended to afford protection against the impairment of the obligation of a contract, so that the social interest in promised advantages has now been recognized by the United States Supreme Court as a limitation on both the federal and the state governments.''

[12] State ex rel Clark v. Stout, Township Trustee (1933) 206 Ind. 58, 64; Whitlach v. School Township of Milan (1925) — Ind. —, 198 N. E. 85, 87.

[13] Lewis v. Brackenridge (1822) 1 Blackf. 220, 221.

[fol. 50] [File endorsement omitted.]

IN THE SUPREME COURT OF INDIANA

[Title omitted]

MOTION FOR A REHEARING—Filed March 13, 1937

The Appellant respectfully petitions the Court for a rehearing in the above entitled appeal on the following grounds:

[fol. 51] 1. The Supreme Court erred in affirming the judgment of the Wabash Circuit Court.

2. The Supreme Court erred in holding that each succeeding General Assembly "is free and untrammelled in its right to change government policy," when the change thereof would destroy contracts and contractual rights, entered into in good faith under Acts of a prior General Assembly.

3. The Court erred in holding that school teacher's tenure contracts under the Acts of the General Assembly of the State of Indiana, Acts 1927, Chapter 97, pp. 259-262, are subject to revocation by the General Assembly of the State of Indiana on the grounds of public policy.

4. The Court erred in holding that the repeal of the Teacher's Tenure Law of 1927, Chapter 97, pp. 259-262, insofar as it affects townships and township schools, permits the township school corporation to impair, revoke and annul contracts that had ripened into permanent teachers contracts under the prior law.

Respectfully submitted, Franklin W. Plummer, Howard E. Plummer, Attorneys for Appellant.

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[fol. 52] IN THE SUPREME COURT OF INDIANA

[Title omitted]

AMENDMENT TO PETITION FOR A REHEARING—Filed March 15, 1937

The appellant within the time limited for filing a petition for a rehearing herein files this amendment to appellant's petition for a rehearing for the purpose of adding addi-

tional grounds thereto and supporting same by further law points and references to the brief in support of the petition for rehearing heretofore filed, the grounds for rehearing herein added being numbered consecutively after the grounds heretofore submitted in appellant's petition for a rehearing.

5. The Court erred in holding that appellant's contract was not within the protection of Article I, Section 10 of the Constitution of the United States.

[fol. 53] 6. The Court erred in holding that Section 1 of Chapter 116, page 716 of the Acts of 1933 constitutionally abrogated contract appellant sued upon.

7. The Court erred in holding that Section 1 Chapter 116 of the Acts of 1933 operated retrospectively so as to vitiate appellant's contract sued upon.

8. The Court erred in holding that the contract of the appellant under the Act of 1927, chapter 27, Section 1 did not constitute a contract within the meaning of the Contract-Impairement clause in Section 10 of Article I of the Constitution of the United States.

9. The Court erred in not giving effect to Chapter 36 Section 1, page 73 Acts of Special Session of 1877, being Burns 1933 Section 1—307, which reads as follows:

"Whenever an act is repealed which repeals a former act, such act shall not thereby be revived, unless it shall be so expressly provided. And the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute unless the repealing act shall so expressly provide; and such statute shall be treated as still remaining in force for the purposes of sustaining any proper act or prosecution for the enforcement of such penalty, forfeiture or liability."

If appellant's employment was a contract under the Teacher's Tenure Act of 1927, then notwithstanding any effect that the Teacher's Tenure Act of 1933 may have had, appellant's contract would be preserved by virtue of Burns Sec. 1—307 because it would have been a standing liability at the time of the enactment of the Act of 1933.

Central Indiana Railroad Co. vs. Davis, 78 Ind. App. 341 (132 N. E. 611).

Wherefore, the appellant further moves for a rehearing upon the grounds above enumerated in addition to those [fol. 54] heretofore filed.

Franklin W. Plummer, Howard E. Plummer, Attorneys for Appellant.

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IN SUPREME COURT OF INDIANA

[Title omitted]

ORDER DENYING REHEARING—April 27, 1937

Come now the parties by counsel and the Court, being advised in the premises, denies the appellants petition for a rehearing heretofore filed herein (with an opinion pronounced by Fansler, J.) (H. I.). Treanor, J. Dissents.

G. L. Tremain, Chief Justice.

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[fol. 55] IN THE SUPREME COURT OF INDIANA

[Title omitted]

OPINION ON DENIAL OF PETITION FOR REHEARING

FANSLER, J.:

On petition for rehearing, appellant earnestly contends that the decision of this case gives a retroactive effect to a statute, and permits the impairment of the obligation of a binding contract. The original opinion was intended to be understood as expressing the view that no contractual right to be continued as a teacher from year to year is involved. The teachers' contracts are made for one year, and the terms may be changed annually. The Tenure Statute, in effect, grants a privilege to the teacher who has served five years, and signed a new additional contract to continue as a teacher, under certain conditions, by limiting the power of the local school officers to employ any one in the place of a tenure teacher. The teacher had no contractual right to continue in employment. The statute merely deprived the local school officers of power to employ any other teacher [fol. 56] in place of the tenure teacher, and required that the tenure teacher be reemployed unless there was a necessary reduction in the number of teachers. Schools are un-

der the control of the Legislature, and local government units act only as legislative agencies in the operation of the schools. The statutes, the Constitution, and the law, must be deemed to be a part of every teacher's contract. If appellant's contention could be sustained, it would mean that the statute, as it existed at the time a teacher acquired tenure status, could not be changed, even in respect to the grounds of cancel-ation of removal.

As pointed out in the original opinion, the Legislature, in enacting school laws, exercises one of the functions of sovereignty. The right to control public policy, in respect to the management and operation of schools, cannot be contracted away by one Legislature so as to fix a permanent public policy, unchangeable by succeeding Legislatures.

But, if the relationship were considered as controlled by the rules of private contract, the provision for reemployment from year to year is not enforceable for want of mutuality. The teacher may terminate the tenure at any time, except during the school year and for thirty days previous to its beginning, by giving five days' notice. This provision clearly indicates that the statute was not intended to bind the state or the teacher to a permanent relationship; that it was intended only as a limitation upon the discretion of local school officers. Davis v. Davis, Director General of Railroads (1926) 197 Ind. 386, 151 N. E. 134; Kostanzer et al. v. State ex rel. Ramsey (1933) 205 Ind. 536, 548, 549, 187 N. E. 337, 342.

[fol. 57] The latter case was an action by a teacher to mandate the school board to continue her as a teacher in the schools under the Tenure Statute. It is said in the opinion: "The tenure act permits a teacher to cancel his contract at any time after the close of a school term up to thirty days prior to the beginning of the next school term, provided five days' notice is given, and appellant contends that there was no contract between appellee and appellants for the reason 'that a contract which does not bind both parties binds neither of them.' This proposition is undoubtedly supported by the law of contracts. But there is nothing in the law of contracts to prevent one party to a contract granting to the other the privilege of rescission or cancellation on terms not reserved to the former party. The local school corporations are agents of the state in the administration of the public schools and the General Assembly has the power to prescribe the terms of the contract to be executed

by these agents." The controlling principle is that local school corporations, being agents of the state, must follow the statute and continue tenure teachers in employment so long as the statute is unrepealed. It is of no consequence whether the tenure rights are based upon a contractual obligation or upon a mere privilege granted by the state revocable at will. The ministerial agents must obey the statutory mandate in either event. But now the statute has been repealed. The Legislature is no longer exercising discretion in the matter of reemployment. That discretion is again lodged in the local officers. It is now contended, not that ministerial officers must follow the dictates of the [fol. 58] Legislature, but that the Legislature itself is bound by contract to continue teachers' tenures; that the tenure arises out of a contract which created a vested right and not out of a mere privilege or by grace. No question of the state being bound by contract creating a vested right was presented in the Kostanzer case. Teachers have no contractual right to a license, but, when they have complied with the statutory requirements, ministerial officers may be mandated to grant the license. The statement that "there is nothing in the law of contracts to prevent one party to a contract granting to the other the privilege of rescission or cancellation on terms not reserved to the former party," is correct as an abstract proposition of law, but it is not without limitation. In contracts for personal services, the provision granting a privilege to the employee to cancel or rescind at will must be supported by some consideration independent of the reciprocal agreements to render service and to be paid for services rendered. It is said in Williston on Contracts, § 104, p. 351, that: "The promise of either party may be optional, if the exercise of the option not to employ or to serve involves a detriment to the promisor, or benefit to the promisee." See McMullan v. Dickinson Co. (1896) 63 Minn. 405, 65 N. W. 661. Where an employer, as part of the agreement in settlement of a claim for damages arising out of negligence, agrees to give the employee permanent employment, and the employee is left free to cancel and leave the employment, the contract is not bad for want of mutuality for the reason that the settlement is payment in advance for the privilege of discontinuing the employment at will. Other similar considerations might be suggested, but it is well settled that, where the term of service is left to the [fol. 59] discretion of one party, it is a contract at the will

of either and may be terminated by either. It has been said that where the terms of a contract of employment give a privilege to one party to terminate the contract, the law will extend the privilege to the other. Pennsylvania Co. v. Dolan (1892) 6 Ind. App. 109, 32 N. E. 802; Cox v. Baltimore & O. S. R. Co. (1913) 180 Ind. 495, 103 N. E. 337.

It is contended that the opinion gives the repealing statute retroactive effect, but it does not. All annual teaching commitments continue, and the repeal acts only prospectively by striking down for the future those limitations which the statute placed upon the discretion of local school authorities with respect to reemployment of teachers for successive years.

Since the opinion was filed, the Supreme Court of the United States has sustained the Court of Errors and Appeals of the State of New Jersey in appeals from two cases involving a situation comparable in all substantial respects with the case at bar. Phelps v. Board of Education of Town of West New York et al. (No. 454, March 1, 1937) — U. S. —; Askam et al. v. Board of Education of Town of West New York et al. (No. 455, March 1, 1937) — U. S. —.

Petition for rehearing denied.

Mandate of the Supreme Court of the State of Indiana issued to the Wabash Circuit Court of Wabash County, Indiana, this 27th day of April, 1937, in conformity with the judgment of this court above stated according to law.

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[fol. 60] IN THE SUPREME COURT OF INDIANA

[Title omitted]

CERTIFICATE OF COURT CLARIFYING OPINION—June 23, 1937

It is ordered that the following entry be made upon the order book of this court respecting the above entitled cause.

The original opinion contains the following statement: "A demurrer to the complaint was sustained. The relatrix contends that this was error; that, having become a permanent teacher under the Teachers' Tenure Law before the amendment, she had a vested property right in her indefinite contract, which may not be impaired under the Constitution."

In the opinion, the word "Constitution" referred to, and was intended to mean, article 1, section 10, of the Con-

[fol. 61] stitution of the United States of America.

This entry is made at the request of the relatrix in order to show jurisdiction in the United States Supreme Court of an appeal or petition for certiorari, and the clerk is authorized to certify this order, at the request of the relatrix.

In Witness Whereof, the undersigned, the Chief Justice and Associate Judges of the Supreme Court of Indiana, have affixed their hands, this 23 day of June, 1937.

Michael L. Fansler, Chief Justice. George L. Tremain. James P. Hughes. Curtis W. Roll. Walter E. Treanor.

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[fol. 62] IN THE SUPREME COURT OF INDIANA

[Title omitted]

PRÆCIPE FOR TRANSCRIPT—July 8, 1937

To the Supreme Court of Indiana and to the Clerk of Said Court:

The relatrix, Dorothy Anderson, hereby requests that there be duly certified a full, true and complete transcript of all of the record, rulings, decisions, opinions, and proceedings in the above entitled cause in the Supreme Court of Indiana, including full, true and complete copies of the original transcript filed herein, the assignment of errors, the decision, minority and majority opinions rendered herein, the petition for rehearing filed herein, and the rulings and opinions rendered in respect thereto, and also of the judgment and mandate in said Supreme Court of Indiana, also of the order and certificate signed by the Chief Justice and Judges of said court and directed to be made a part of the record in said cause on June 23, 1937, for transmission to the Supreme Court of the United States [fol. 63] and for use in the review of said judgment by the Supreme Court of the United States by proceedings in said court in certiorari.

Plummer & Plummer, Denver C. Harlan, Paul R. Shafer, Charles Eggleston, Thomas F. O'Mara, Counsel for Dorothy Anderson.

---

[fol. 64] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 65] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 15, 1937

The petition herein for a writ of certiorari to the Supreme Court of the State of Indiana is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
JUL 27 1937
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937.

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# No. 256

---

STATE OF INDIANA ON THE RELATION OF DOROTHY ANDERSON,

*Petitioner,*

*vs.*

HARRY BRAND, TRUSTEE OF CHESTER SCHOOL TOWNSHIP OF WABASH COUNTY, INDIANA.

---

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA AND BRIEF IN SUPPORT THEREOF.

---

FRANKLIN W. PLUMMER,
*Wabash, Indiana;*
HOWARD E. PLUMMER,
*Wabash, Indiana;*
THOMAS F. O'MARA,
*315 Grand Opera Bldg.,*
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*Terre Haute, Indiana;*
CHARLES M. EGGLESTON,
*Terre Haute, Indiana;*
DENVER HARLAN,
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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1937.**

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# No. 256

---

STATE OF INDIANA ON THE RELATION OF DOROTHY ANDERSON,

*Petitioner,*

*vs.*

HARRY BRAND, TRUSTEE OF CHESTER SCHOOL TOWNSHIP OF WABASH COUNTY, INDIANA.

---

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

---

*To the Honorable Charles Evans Hughes, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, Dorothy Anderson, relatrix in the above entitled cause, shows:

I.

**Summary Statement of the Matter Involved.**

The petitioner, as relatrix, filed in the Wabash Circuit Court in Wabash County, Indiana, an action in mandate against one Walter E. Boyer, then Trustee of Chester School

Township, the present respondent Harry Brand, Trustee, being thereafter duly substituted as defendant in the original Court to compel the Trustee to continue the employment of the petitioner as a permanent teacher in said school township (R. 4). Petitioner's complaint alleged her qualifications and her employment beginning in 1924 continuously thereafter in the same school township and her continuous employment as a permanent teacher under the Teachers' Tenure Act of the General Assembly of Indiana for 1927, Chapter 97, Section 1, page 259 of the Indiana Acts of 1927 (Burns' Ind. Stats. Ann. Supp. of 1929, Section 6967.1). The last of her consecutive annual contracts being made for the school year 1932-1933. This complaint alleged that respondent was wrongfully refusing to recognize petitioner's contract of employment under said Act (R. 1).

The complaint further alleged that the contracts between petitioner and respondent for the school year 1931-1932 and 1932-1933 contained the following clause:

> "It is further agreed by the contracting parties that all of the provisions of the Teachers' Tenure Act, approved March 8, 1927, shall be in full force and effect in this contract" (R. 1).

Section 1 of the Teachers' Tenure Act of 1927 (Section 1, Chapter 97, Indiana Acts of 1927, beginning page 259, Burns' Ind. Stats. Anno. Supp. of 1929, Section 6967.1) provided as follows:

> "That any person who has served or who shall serve under a contract as a teacher in any school corporation in the State of Indiana for five or more successive years and who shall hereafter enter into a teachers' contract for further services with such corporation, shall thereupon become a permanent teacher of such corporation."

And further provided that:

> "Upon the expiration of any contract between such school corporation and a permanent teacher, such contract shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract. Such an indefinite contract to remain in force unless succeeded by a new contract signed by both parties or unless it shall be cancelled as provided in Section 2 of this Act."

Section 2 of this Act provided that only for certain enumerated reasons, and only after notice and hearing, could a permanent teacher's contract be cancelled. Section 4 of this Act provided under penalty of suspension of a permanent teacher's license that a permanent teacher could not herself cancel the contract during the school term or for a period of 30 days previous thereto except by mutual agreement and at other times during vacation only by five days notice.

As originally enacted in 1927 said Act expressly applied to permanent teachers' contracts in all school corporations, including township school corporations.

Prior to any amendment of the Teachers' Tenure Act of 1927, and prior to the school year of 1932-1933, the Supreme Court of Indiana, on March 28, 1932, in the case of *Elwood* v. *State ex rel. Griffin*, 203 Ind. 626, construed Section 1 of Chapter 97 of the said Act of 1927, as follows:

> "The position of a teacher in the public schools is not a public office but an employment by contract between the teacher and the school corporation. The relation remains contractual after the teacher has, under the provisions of the Teachers' Tenure Law, become a permanent teacher * * * but the terms and conditions of the contract are thereafter governed primarily by the statute."

Respondent demurred to this complaint for want of sufficient facts insisting upon the abrogation of petitioner's

contract by Section 1 of Chapter 116, beginning 716 Indiana Acts of 1933 (Burns' Ind. Stats. Ann. 1933, Section 28-4307), which amended section 1 of chapter 97 of said Act of 1927 (Burns' Ind. Stats. Ann. Supp. of 1929, Section 6967.1) by omitting therefrom all reference to school township corporation, but retaining all other school corporations within its terms. This amendatory Act of 1933 made no other material change, and went into effect by Proclamation of the Governor on May 22, 1933 (R. 5-7).

The Wabash Circuit Court sustained respondent's demurrer on March 24, 1934, petitioner excepting (R. 7).

Judgment was thereupon rendered against petitioner on demurrer that she take nothing by her action (R. 7). Petitioner duly appealed from this judgment to the Supreme Court of Indiana on April 18, 1934, and the cause was submitted on May 18, 1934, the only error assigned being error in sustaining respondents demurrer (R. 12). On January 14, 1937, the Supreme Court of Indiana affirmed the judgment of the Wabash Circuit Court in a majority opinion reported in 5 N. E. (2d) p. 531 (no official report thereof having been yet published). On April 27, 1937, the Supreme Court of Indiana denied petitioner's petition for rehearing and finally affirmed said judgment and a mandate of affirmance was accordingly issued to the Wabash Circuit Court on April 27, 1937. The majority opinion upon rehearing appears in volume 7 N. E. (2d) p. 777, and the dissenting opinion of Judge Treanor upon the original hearing in volume 5 N. E. (2d) 913, no official reports of said opinion having been yet published. (First majority opinion, R. 13-15; majority opinion on rehearing R. 31-34; dissenting opinion, R. 15-28.)

A written order signed by the Chief Justice and all the Judges of the Supreme Court of Indiana was entered in

said cause, the material portion of said order reading as follows:

> "It is ordered that the following entry be made upon the order book of this court respecting the above entitled cause.
>
> "The original opinion contains the following statement: 'A demurrer to the complaint was sustained. The relatrix contends that this was error; that, having become a permanent teacher under the Teachers' Tenure Law before the amendment, she has a vested property right in her indefinite contract, which may not be impaired under the Constitution.'
>
> "In this opinion, the word 'Constitution' referred to, and was intended to mean, article 1, section 10, of the Constitution of the United States of America" (R. 34).

Contrary to the contentions of the petitioner, the Supreme Court of Indiana in this cause held that petitioner's employment-relationship under her indefinite contract as a permanent teacher under Section 1 of the Teachers' Tenure Act of 1927 was not contractual; that it constituted only a privilege or preferential right to continue in the employment of the school township; that Section 1 of the amendatory Act of 1933 had the effect of repealing so much of Section 1 of the Teachers' Tenure Act of 1927 as authorized her continuous employment thereunder and that her previously existing employment-relationship was thereby abrogated; that the petitioner had no vested property right in her permanent teachers' contract under Section 1 of the Acts of 1927, and that her right to continue in the employment of Chester School Township as a permanent teacher derived and based upon the clause in Article 1, Section 10 of the Constitution of the United States forbidding any State to pass a law impairing the obligation of contracts was not impaired by the enactment of section 1 of the amendatory Act of 1933 abrogating her employment-relationship as a permanent teacher.

## II.

**Reasons Relied on for the Allowance of the Writ.**

(1). In this cause there was specially claimed by the petitioner her right, derived from and based upon the provision of Article 1, Section 10 of the Constitution of the United States that no State shall pass any law impairing the obligation of contracts, to continue to hold, enjoy, and enforce her contract as a permanent teacher with Chester School Township, of which respondent was trustee, under Section 1, Chapter 97 of the Acts of the General Assembly of Indiana of 1927, notwithstanding the enactment of Section 1 of Chapter 116 of the Indiana Acts of 1933 construed by the Supreme Court of Indiana in this cause to apply to and abrogate the petitioner's contract as aforesaid, which claim of the petitioner was erroneously ruled against and denied in the judgment of said court herein.

(2) In this cause there was specially claimed by this petitioner a vested property right in her indefinite contract as a permanent teacher with Chester School Township, under Section 1, Chapter 97, of the Acts of the General Assembly of 1927, and the further right, based upon the provision of Article 1, Section 10, of the Constitution of the United States that no State shall pass any law impairing the obligation of contracts, to continue to hold, enjoy, and enforce said vested right, and that the said right to continue to hold, enjoy, and enforce said contract was abrogated by Section 1 of Chapter 116 of the Acts of the General Assembly of Indiana of 1933 in violation of said clause of Article 1, Section 10, of the Constitution of the United States, and each of said claims of this petitioner was erroneously overruled and denied by the judgment of the Supreme Court of the State of Indiana.

(3) In said cause there was drawn in question the validity of Section 1 of Chapter 116 of the Acts of the General Assembly of Indiana of 1933 as being repugnant to the provisions of Article 1, Section 10 of the Constitution of the

United States that no State shall pass any law impairing the obligation of contracts, the validity of which Act was erroneously sustained by the Supreme Court of Indiana in its judgment in said cause.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Supreme Court of the State of Indiana, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Supreme Court of Indiana had in the case numbered and entitled on its docket, No. 26560, State of Indiana on the relation of Dorothy Anderson, appellant v. Harry Brand, Trustee of Chester School Township of Wabash County, Indiana, appellee, to the end that this cause may be reviewed and determined by the Court as provided by the statutes of the United States; and that the judgment herein of said Supreme Court of Indiana be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated July 14, 1937.

DOROTHY ANDERSON, Relatrix,
*Petitioner Herein,*
By FRANKLIN W. PLUMMER,
*Wabash, Indiana;*
HOWARD E. PLUMMER,
*Wabash, Indiana;*
THOMAS F. O'MARA,
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PAUL R. SHAFER,
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CHARLES M. EGGLESTON,
*Terre Haute, Indiana;*
DENVER HARLAN,
*Richmond, Indiana,*
*Counsel for Petitioner.*

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1937.**

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# No. 256.

---

STATE OF INDIANA ON THE RELATION OF DOROTHY ANDERSON,

*Petitioner,*

*vs.*

HARRY BRAND, TRUSTEE OF CHESTER SCHOOL TOWNSHIP, WABASH COUNTY, INDIANA.

---

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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### I.

### Jurisdiction.

The judgment of the Supreme Court of Indiana affirming the judgment of the trial court that petitioner take nothing by her complaint was rendered on January 14, 1937. A petition for rehearing was seasonably filed and considered by the Supreme Court and denied with an additional opinion on April 27, 1937, and a mandate accordingly issued on April 27, 1937.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, Amended Subsection b (Section 344, 28 U. S. C. A.).

Under part II of the foregoing petition for writ of certiorari there are set out in the petition herein reasons (1) and (2) setting forth a right of the petitioner derived from and based upon the contract clause of Article 1, Section 10 of the Constitution of the United States to continue to hold and enjoy petitioner's contract as a permanent teacher under the provisions of Section 1 of Chapter 97 of the Acts of the General Assembly of Indiana of 1927 (Burns' Ann. Ind. Stat. Supp. of 1929, Section 6967.1) (as against impairment by Section 1 of Chapter 116, Indiana Acts of 1933, page 716, Burns' Ann. Ind. Stat. 1933, Section 28-4307), which right was denied by the decision of the court below; also reason (3) to the effect that the validity of Section 1 of Chapter 116 of the Indiana Acts of 1933 (Burns' Ind. Stat. Ann. 1933, Section 28-4307) was drawn in question as being repugnant to the contract clause of Article I, Section 10 of the Constitution of the United States.

Reference is made to the certificate signed by all the judges of the Supreme Court made a part of the record clarifying the original opinion of the Court and quoted in the Petition, *supra*, under II, Summary Statement of the Matter Involved. This, of course, became a part of the opinion of the Court.

*Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Co.* v. *George W. Bay and William Bay*, 200 U. S. 179, 182;

*Consolidated Turnpike Company* v. *Norfolk & Ocean View Railway Company*, 228 U. S. 596, 599;

*Charlotte Anita Whitney* v. *People of the State of California*, 274 U. S. 357, 360, 362;

*International Steel & Iron Company* v. *National Surety Company*, 297 U. S. 657.

In this cause the foregoing substantial Federal questions were necesarily, as well as expressly involved and decided.

These questions have not been determined theretofore by this Court, and especially have not been determined by *Phelps* v. *Board of Education of the Town of West New York; Askam* v. *Board of Education of West New York,* both decided by this Court March 1, 1937, 57 S. Ct. 483, as appears upon a comparison of Sections 1 and 2 of the Indiana Teachers' Tenure Act of 1927 (Sections 1 and 2, Chapter 97, Indiana Acts of 1927, pp. 259 and 260) (Burns' Ann. Ind. Stat. Supp. of 1929, Section 6967.1-2) with Section 1 of Chapter 243 N. J. Laws 1909, Pamph. L., page 398 (4 N. E. Comp. Laws 1933, Pamph. L., page 24) the latter being the statute considered and construed in these cases. This comparison is developed in the argument below under (1).

## II.

## The Statement of the Case.

The Court is respectfully referred to the *Statement of the Case* under that heading in I of the foregoing petition for the writ of certiorari. We wish to state, however, that this Act involves the question whether a tenure teacher's contract, under the Act of the General Assembly of Indiana of 1927, Chapter 97, Sections 1 and 2, commonly known as Indiana Teachers' Tenure Act of 1927, is protected against impairment by a repealing statute, construed to abrogate pre-existing contracts. The question is of great public interest owing to the prevalence of a teachers' tenure system throughout the State of Indiana explicitly based upon contracts and also on account of the prevalence of such a system in the State of Wisconsin in which heretofore the Teachers' Tenure Law has been protected against impairment under the contract clause of the Constitution of the State of Wisconsin as decided in *State ex rel. Nyberg* v. *Board of Directors of Milwaukee,* 190 Wis. 570.

## III.

## Summary of Argument.

(1) The cases of *Phelps* v. *Board of Education of West New York; Askam* v. *Same,* companion cases reported in 57 Sup. Ct. Rep., p. 483, do not foreclose consideration of this cause, because of the essential differences between the New Jersey statute considered in these cases and the Indiana Teachers' Tenure Act, in that the former is not grounded on a contractual relationship, while the Indiana statute is expressly grounded on a contractual relationship and expressly provides for the continuance of the contract as such. A further difference consists in the requirement of the Indiana Statutes that all employment of public school teachers shall be by written contract, and in the previous court decisions of the latter state treating the teacher's employment relationship as contractual. There was no similar previous statutory or administrative history in New Jersey.

(2) This Court is not bound by the construction accorded to the Indiana Teachers' Tenure Act of 1927. The lower court erroneously construed this Act in holding that the permanent teacher's employment under this Act was not contractual. In so doing the Supreme Court overruled its previous decisions construing the same to give rise to a contract when imported into the teacher's contract thereunder. These former interpretations of the Act occurred prior to the amending Act of 1933 which literally preserved the language of the former Act expressly declaring that when a teacher made a contract for the sixth consecutive year that contract should remain in effect until cancelled. The amendatory Act of 1933 necessarily re-enacted this previous construction by keeping literally intact all the language of the 1927 Act and merely omitted therefrom

township school corporations, the class of school corporations to which respondent's corporation belonged.

The entire previous statutory and judicial history of the Indiana School System reveals the consistent treatment of the teacher's employment relationship as contractual.

The plain wording of the Act of 1927 and its persistent employment of the word "contract" throughout its text was not given effect in the court's construction of the Act, although a statutory rule of the constitution in Indiana so requires. The court also failed to observe that the "permanent" or "indefinite contract" is consensually initiated and contains every element of a contract in the true sense of the word.

(3) The court below erred in holding the petitioner's contract not entitled to protection against impairment under the contract clause of Article I, Section 10 of the Federal Constitution. The contract was mutually binding and consisted of the statute embodied therein by express reference and the previous construction thereof.

The court below declared that township school corporations were omitted from the amendatory Act of 1933 to accomplish a change in the policy of the 1927 Act and had the effect of abrogating petitioner's contract. But under *Coombes* v. *Getz*, 285 U. S. 434, 442, petitioner's contract had acquired an independent existence and was protected under the contract clause.

Under the terms of the Act of 1927 petitioner's contract could after notice and hearing be cancelled for every conceivable reason affecting the public interest. The elimination of the provision for notice and hearing and the provision prohibiting dismissal for personal and political reasons was the only net effect achieved by the amendatory Act. These considerations could not support the abrogation of the contract as a valid exercise of the police power. In

fact the Act merely effected a change of conveniences and did not accomplish a discernible public purpose. The petitioner's contract is a valuable right representing the investment of personal talent and educational work on the teacher's part, and is entitled to the same protection against impairment although equally subject to regulative legislation as a public franchise. Otherwise a permanent teachers' tenure system is essentially impossible because of the alleged disability of the State to bind itself permanently. The police power so construed achieves an incapacity on the part of the State to accomplish a desirable public purpose. The balance of social values in this case clearly supports the application of the contract clause.

(4) The repealing or amendatory Act of 1933 was unconsitutional being in conflict with the contract clause of Article I, Section 10 of the Federal Constitution for reasons given under (3) above.

## IV.

## ARGUMENT.

**1. The Federal questions involved in the present case were not determined in the Phelps v. Board of Education of West New York—Askam v. Board of Education of West New York, 57 Sup. Ct. Rep. 483.**

We set out Sections 1 and 2 of the Indiana Teachers' Tenure Act of 1927 forming the basis of petitioner's contract, in Appendix A of this brief, and the pertinent section of the New Jersey act considered in the cases just mentioned, in Appendix B.

The New Jersey Act purports upon its face to be a mere direction to school officials relative to the reduction of salaries of tenure teachers and their dismissal. It discloses no concept of a contractual nature.

There was no legislative, administrative, or judicial experience in New Jersey showing that the relationship of teachers to school corporations was in that State considered or treated as contractual.

In strong contrast are the provisions of Sections 1 and 2 of the Indiana Teachers' Tenure Act of 1927. The language employed is repetitious in the use of the word "contract." Section 1 expressly declares:

> "Upon the expiration of any contract between such school corporation and a permanent teacher, such contract shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract. Such an indefinite contract shall remain in force unless succeeded by a new contract signed by both parties, or unless it shall be cancelled as provided in Section 2 of this Act."

Many decisions of the appellate tribunals in Indiana prior to 1927 recognized a teacher's employment as contractual, and entertained and enforced actions on contract for their breach.

*Harrison School Tp.* v. *McGregor*, 96 Ind. 185;
*Kiefer* v. *Troy School Tp.*, 102 Ind. 279;
*Morrison* v. *McFarland*, 51 Ind. 206;
*Schwier* v. *Zitike*, 136 Ind. 210;
*Charlestown School Tp.* v. *Hays*, 74 Ind. 127;
*Sparta School Tp.* v. *Mendell*, 138 Ind. 188 (37 N. E. 1059).

In *Elwood* v. *State ex rel. Griffin*, 203 Ind. 626, 634, the Supreme Court of Indiana declared:

> "The position of a teacher in the public schools is not a public office, but an employment by contract between the teacher and the school corporation. The relation remains contractual after the teacher has, under the provisions of a Teachers' Tenure Law, become a permanent teacher—but the terms and conditions of

the contract are thereafter governed primarily by the statute."

This case was decided March 29, 1932, before the beginning of the last school year for which petitioner had a written contract, namely 1932-1933, and before the Amendatory Act of 1933, Section 1, Chapter 116, Acts of 1933, page 716, was enacted.

All the decisions of appellate tribunals of Indiana prior to the decision of the Supreme Court in the present proceeding treated and considered the teacher's relationship of employment under the Act of 1927 as a contract and enforced the collection of salary thereunder and enforced the continuance of the employment by mandate. These decisions are:

*State ex rel. Clark* v. *Stout,* 206 Ind. 58 (187 N. E. 267);
*Kostanzer* v. *State ex rel. Ramsey,* 205 Ind. 536 (187 N. E. 337);
*State ex rel. Black* v. *Board of School Comrs.,* 205 Ind. 582 (187 N. E. 392);
*Barnes* v. *Mendenhall,* 98 Ind. App. 229 (183 N. E. 556);
*School City of Elwood* v. *State ex rel. Griffin,* 203 Ind. 626 (180 N. E. 471);
*School City of Evansville* v. *Culver,* 94 Ind. App. 692 (182 N. E. 270).

The history of school legislation in Indiana reflects a contractual concept of the relationship of a teacher employed by a school corporation.

Act March 5, 1855, Chapter 148, Section 107 (*Gaven* v. *Hord,* Indiana Statutes 1860);
Act March 6, 1865, page 3, Section 28, Burns' 1881, Section 4501;
Act March 3, 1871, Chapter 25, Section 5, clause 5, pp. 20-22.

Act March 8, 1873, Chapter 25, page 75, Section 9, providing:

> "The Township Trustee shall specify, in a written contract with each teacher that such teacher shall attend the full session of each institute."

Acts of 1899, page 173, Sections 1, 2, re-enacted, Chapter 91, Section 1 Acts of 1921 (Burns' Ind. Stats. Ann. 1933, Sections 28-4304).

> "That all contracts hereafter made by and between teachers and school corporations of the state of Indiana shall be in writing, signed by the parties to be charged thereby, and no action shall be brought upon any contract not made in conformity to the provisions of this Act."

Prior to the Act of 1899 verbal contracts were enforceable.

*Jackson Township* v. *Shera,* 8 Ind. App. 330.

This Court in considering the New Jersey statute declared; "we find nothing in the record to indicate that the board is bound by contract with the teacher for more than the current year" (p. 485), and also commented on the practice in that State of no specific contracts being made under the statute in question.

These points of contrast with the Indiana Statute are further developed in the discussion next following. It should be observed that the Supreme Court of Wisconsin in *State ex rel. Nyberg* v. *Milwaukee,* 190 Wis. 570, sustained a tenure teacher's contract under the contract clause of the Wisconsin State Constitution against the repeal of the Tenure Act largely because the tenure status was based upon the employment proper of the teacher, although this employment feature of the Wisconsin Act is not nearly as strong and obvious as in the Indiana Act.

**2. The court erred in holding that the employment relationship existing by virtue of petitioner's indefinite contract under Section 1 of the Teachers' Tenure Act of 1927 was not a contract.**

It is elementary that this Court is not bound by the construction given to a State statute by the highest court of a State, where the contract clause of the Federal Constitution is involved, and in such cases this Court will determine for itself the proper construction of the statute. The same rule applies to the existence and terms of a contract, the obligation of which is asserted to be impaired.

*Phelps* v. *Board of Education of the Town of West New York, supra;*

*Coombes* v. *Getz,* 285 U. S. 434, 441, and cases there cited;

*Appleby v. City of New York,* 271 U. S. 364, 379, 380;

*Tidal Oil Company* v. *Flanagan,* 263 U. S. 444, 451.

The view of the State Supreme Court in this cause repudiates the previous decisions of the various appellate tribunals of Indiana, including *Elwood* v. *State ex rel. Griffin, supra,* decided by the Supreme Court on March 29, 1932; *Kostanzer* v. *State ex rel. Ramsey, supra,* decided Nov. 2, 1933, and *State ex rel. Black* v. *Board of School Commissioners, supra,* decided Nov. 3, 1933. The present view of the Indiana Supreme Court is also inconsistent with the historic and traditional administrative practice of the State under the Indiana statutes cited under III (1), *supra,* in this brief. Particularly does the statutory requirement that all contracts of teachers shall be in writing, now in force in the State for over 35 years, strongly support the petitioner's contention of the contractual nature of the employment expressly designated a "contract" in the Act of 1927.

A statute of long standing, Burns' Ind. Stat. Ann. 1933 (1852) Section 1-201, First Clause, prescribes as a rule for

the construction of all statutes that "words and phrases shall be taken in their plain, or ordinary and usual sense." Much force is properly attributable to the repeated use of the word "contract," occurring ten times in Section 1 and eleven times in Section 2 of the Act of 1927.

The contract of employment is consensually initiated under Section 1 of this Act. It provides "any person who has served or who shall serve under contract as a teacher * * * for five or more successive years, and who shall thereafter enter into a teacher's contract for further service with such corporation shall thereupon become a permanent teacher of such school corporation." The act therefore expressly provides that the very execution of the teacher's contract for the sixth consecutive year has the instantaneous effect of constituting the teacher a permanent teacher of the school corporation indefinitely thereafter. In the succeeding sentence the legislature itself declares the contractual effect of entering into the contract for the sixth consecutive year. "Upon the expiration of any contract between such school corporation and a permanent teacher, such contract shall be deemed to continue for an indefinite period and be known as an indefinite contract. Such an indefinite contract shall remain in force unless succeeded by a new contract or unless it is cancelled as provided in Section 2 of this Act." * * *

Both parties know at the time of the inception of the teacher's contract for the sixth consecutive year, that each party is bound indefinitely thereby until the contract is cancelled in compliance with the requirements of the Act. The consequences resulting from this act of the parties enters into the consent given to the contract. The contract is a composite of the consensual acts of the parties and the provisions of the law. Petitioner's contract expressly made the provisions of this act a part thereof.

Such a contract had ample consideration. The teacher's right of cancellation was entirely inhibited under Section 4 of the Act during the entire school year and for thirty days preceding the beginning of the school year, and, during the remainder of vacation the teacher's right of cancellation required five day's notice. The teacher's wrongful concellation was punished by forfeiture of her license for 1 year. The school corporation surrendered the right of cancellation except when exercised within the restrictions of Section 2, requiring notice and hearing, and in no case for personal or political reasons.

The Amendatory Act took effect May 22, 1933, the *Elwood* case having been decided in March 1932, previous to the end of the school year 1931-1932, and long before the time had arrived for making petitioner's contract for the school year 1932-1933.

After this construction of Section 1 of the 1927 Act by the State Supreme Court in *Elwood* v. *State ex rel. Griffin,* 203 Ind. 626, the Legislature re-enacted in the Amendatory Act of 1933 literally all of the language so construed, which was descriptive of the contract, and of the continuing effect of the contract of employment entered into for the sixth consecutive year. The rule in Indiana as to the re-enactment of an Act previously construed is very strong and is thus stated in *Barr v. Sumner,* 183 Ind. 402, 409:

> "The re-enactments, under the circumstances, adopted the previous constructions of the Act by this Court. State *vs.* Ensley (1912) 177 Ind. 483, 97 N. E. 113, Ann. Cas. 1914 D 1306. Were we of the opinion that all those consistent decisions are erroneous all would be without rightful authority to overrule them, because this court is vested with no legislative power."

This Court would be readily justified in holding the petitioner's employment a contract under the *Elwood* case, *supra,* in view of this re-enactment and the necessary effect

of the same upon the construction of the Act of 1927. When the lower court construed the Act of 1927 on January 14, 1937, in petitioner's case, the question was no longer an open one under the settled rules of statutory construction. While the Act of 1933 could have no effect as such upon a previous contract, it undoubtedly had the effect of confirming the previous judicial construction of the language re-enacted.

Section 2 of the Act provides for cancellation for cause after hearing and that except where the cause is immorality or insubordination the cancellation shall go into effect at the end of the school term following. This would be absurd, if the contract were merely from year to year as held in the majority opinion below.

All the elements required to constitute a contract are present in the employment relationship under this Act, such as competent parties, subject-matter, a legal consideration, mutuality of agreement and of obligation. In *Haskell & Barker Car Company* v. *Allegheny Forging Company*, 47 Ind. App. 392, 394, 395, these were held to be the requisites of a legal contract. The presence of all these elements is not questioned in the majority opinions below, except it is intimated in the majority opinions below that the element of mutuality is lacking. The court below said on rehearing: "The teacher may terminate the tenure at any time, except during the school year and for thirty days previous to its beginning by giving five days notice." The court below referred to want of mutuality in contracts for personal service at common law. But the court disregarded the plain provision that the statute here was itself prescribing the terms of the contract and created a limited right of cancellation in each party thereto. Certainly the policy and effect of the statute cannot be nullified by a non-statutory rule.

The court's reference in the first majority opinion to the proposition contended for by the school corporation in

*Kostanzer* v. *State ex rel. Ramsey*, 205 Ind. 536, 548, that the contract was not binding on it because not binding on both parties was there answered by the Court as follows:

> "But there is nothing in the law of contracts to prevent one party to a contract granting to the other the privilege of rescission or cancellation on terms not reserved to the former party. The local school corporations are agents of the state, * * * and the General Assembly has power to prescribe the terms of the contract to be executed by these agents." Page 548.

The opinion in the *Kostanzer* case thus distinctly holds the limited cancellation privilege does not destroy the existence of the contractual relationship resulting from accepting the terms of the statute. This seems the sounder construction.

The remarks of the court in the first majority opinion that "the contract is variable as to compensation" is a misreading of a proviso in Section 1 of the 1927 Act which declares: "that teachers' contracts may contain provisions for fixing the amount of annual compensation from year to year by a salary schedule adopted by the school corporation, and such schedule shall be deemed to be a part of such contract." Of course this would not apply unless the teacher's written contract which was carried forward as an indefinite contract specifically provided for an annual salary schedule. Where such a provision was contained in the contract as to the future annual compensation, it would merely be a case of *Id certum est quod certum reddi potest.* A public act of a general nature, namely, the adoption annually by a public school corporation of a schedule, presumably general in its application, would definitely fix the compensation. Also the Indiana Teachers' Minimum Wage Act (as amended Special Session of 1920, Chapter 56, Section 1. Indiana Acts of 1920, page 194, Burns' Ind. Stats. Ann. 1933, Section 28-4314) fixes an irreducible minimum wage. This Act appears below in Appendix D.

The use of the word "indefinite" in characterizing the contract offers no difficulties, and does not vitiate the certainty of its terms. It has reference merely to the prospective duration of the relationship in view of the mode and reasons definitely prescribed for its termination. It is analogous to the indeterminate franchise of a public service corporation.

Thus no convincing reason appears against the essentially contractual nature of the employment relationship under the Teachers' Tenure Act of 1927.

**3. The court below erred in denying the right claimed by petitioner based upon the contract clause of the Federal Constitution to continue to hold, enjoy and enforce her subsisting permanent teacher's contract consisting of the provisions of the Act of 1927 and her written contract, notwithstanding the repealing effect given to the Amendatory Act of 1933.**

It is indisputable that a contract may consist of the provisions of a statute, the acceptance of the terms of the statute and the judicial construction thereof prevailing at the time of such acceptance.

*New Jersey* v. *Yard*, 95 U. S. 110, 114;
*Douglass* v. *Pike County*, 101 U. S. 679, 686;
*Worthen Co. ex rel. Board of Commissioners of Street Improvement District* v. *Kavanaugh*, 295 U. S. 56, 60.

The obligation of such a contract, even if a State is a party thereto can not be impaired under the contract clause.

*Hall* v. *Wisconsin*, 103 U. S. 5, 10, 11;
*Yard* v. *New Jersey*, *supra*;
*Woodruff* v. *Trapnall*, 10 How. 190, 196.

Section 1 of the Amendatory Act of 1933 is substantially identical with Section 1 of the 1927 Act, except instead of the phrase "in any school corporation" there was substituted

the phrase "in any school city corporation or in any school town corporation." The effect was to delete school township corporations from the amended Act. While there can be no doubt that this inhibited the making of permanent teacher contracts thereafter, the Court below construed the Amendatory Act to apply to the employment-relationship of permanent teachers existing at the time of the enactment of the Amendatory Act, for the Court said in its first majority opinion:

> "The repeal of the statute, in so far as it affects townships and township schools, removes the restriction upon the power of the school corporation so far as it affects the preferential or so-called tenure rights of teachers, and leaves the township officers free to renew teachers' contracts or not as may be deemed expedient."

A more correct view was given of a closely analogous situation by this Court in *Coombes* v. *Getz*, 285 U. S. 434, 442, as to the repealed provision of the Constitution of California imposing liability upon corporate stockholders. There this Court said: "His (petitioner's) cause of action was not purely statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future, but did not and could not destroy or impair the previously vested right of the creditor which in every sense was a property right." Similarly petitioner's indefinite contract as a permanent teacher survived, as an independent entity, the statute which authorized its inception.

A contract for personal services is protected by the contract clause. *Hall* v. *Wisconsin, supra*, held a contract for

engineering services was protected against impairment by the repeal of the statute authorizing the employment by the State while the contract remained in part unperformed. This Court in *Long Island Supply Co.* v. *Brooklyn Trust & Guaranty Co.*, 166 U. S. 685, 690, 691, commented on *Hall* v. *Wisconsin* as follows:

> "Its condemnation is of course subject to the rule of just compensation, and that is all that is implied in the decisions such as Hall *v.* Wisconsin, 103 U. S. 5 (26:302), cited by counsel. In that case it appeared that Hall had a contract with the State for services entered into in pursuance of a statute, that he performed the services, but that before finishing his work the legislature repealed the statute authorizing the contract. It was held that he was nevertheless entitled to his stipulated compensation. The Act of the legislature in the repeal was not one providing for condemnation, and in so far as it partook of the nature of a condemnation it ignored the obligation of just compensation and was therefore void; but it was not held that, if just compensation had been provided and a public use required, the contract might not have been condemned."

Under these authorities it is quite clear that there was involved in the cause below a contract of the petitioner with the school township within the meaning of the contract clause of the Constitution, and under the reasoning in *Coombes* v. *Getz, supra,* the effect given by the Supreme Court of Indiana in its decision to the amendatory Act constitutes an impairment of petitioner's contract, under the contract clause of Article 1, Section 10 of the Constitution of the United States.

It only remains to examine the justification attempted by the court below in support of the denial of petitioner's constitutional right against abrogation by the amendatory act as construed by the court. The court below declared in its first majority opinion:

> "These are matters of public policy, of purely governmental concern in which the legislative power cannot be exhausted, or consumed, or contracted away so as to limit the discretion of future Legislatures" (R. 15).

Again in the majority opinion upon rehearing the court says:

> "The right to control public policy, in respect to the management and operation of schools cannot be contracted away by one Legislature so as to fix a permanent public policy unchangeable by succeeding Legislatures" (R. 32).

From the foregoing, it must be observed that the Supreme Court did not itself predicate the abrogation of pre-existing permanent teachers' contracts by the amendatory act of 1933 upon the police power of the State as such. The majority opinions indicated that it was a mere change of policy on the part of the Legislature. The opinions indicate no evil thereby remedied or any object of public health or morals or welfare thereby achieved.

Indeed an analysis of the situation discloses that the Legislature had changed its mind with reference to the value or the advantage of permanent indefinite teachers' contracts in the rural schools, although it was formerly of the opinion that these contracts were to the advantage of the State in rural schools as well as in town and city schools. Clearly there was no evil in these contracts as such because they are still retained under the amendatory act in town and city schools. The case seems to fall within the principle laid down in *Grand Trunk Western Railroad Company* v. *South Bend*, 227 U. S. 544, 555, where the court observed with reference to the franchise under consideration that "there was nothing contrary to public policy in any of its terms and being valid and innocuous the police power could not be invoked to abrogate it as a

whole or to impair it in part." Observing also that at the time of the inception of the franchise "the municipal authorities were obliged to balance the present and prospective inconveniences of having trains operated through its streets against the advantage of having the railroad accessible to its citizens," the court declared:

> "If the police power can lay hold of such inconveniences and make them the basis of a right to repeal such an ordinance, the contract would be abrogated because of the very growth in the population and business the Railroad was intended to secure."

Prior to the Teachers' Tenure Act of 1927, except to the extent a written contract might otherwise require, the school corporation could for political and personal or other reasons, discharge a teacher during the contract year, but it was subject to court determination as to truth of the facts constituting the cause for discharge.

*Hays* v. *City of Crawfordsville*, 42 Ind. 200.

Under the express provision of Section 2 of the Act of 1927, the determination of the school board as to the facts constituting the cause for discharge, after hearing and notice, was final except for fraud and arbitrary denial of hearing. Under Section 2 of the Tenure Act, also certain causes for discharge were enumerated; "Incompetency, insubordination (which shall be deemed to mean a refusal to obey the school laws of this State, or reasonable rules prescribed for the government of the public schools of such corporation), neglect of duty, immorality, justifiable decrease in the number of teaching positions or other good and just cause, but may not be made for political or personal reasons."

Consequently, when the Legislature, as a matter of public policy, according to the majority opinions, abrogated petitioner's contract, it was a mere choice of convenience of

the one form of the contract over the other, and not in consideration of the public welfare or the remedying of any wrong or the abolition of any evil. As construed by the Supreme Court of Indiana, the Amendatory Act was not only an inhibition of the formation of such contracts in the future, but the doom of the Act is levelled directly at existing contracts. This distinguishes the present case from those cases which have held that the contract clause does not protect pre-existing contracts where, as incidental to the operation of a valid law under the police power to remedy a declared evil or to meet a sudden emergency, pre-existing contracts are swept away as in the line of cases following:

*Louisville & Nashville R. R. Co.* v. *Garrett,* 231 U. S. 298;

*Boston Beer Co.* v. *Mass.,* 97 U. S. 33;

*Home Building & Loan Ass'n* v. *Blaisdell,* 290 U. S. 398.

It is not contended by the petitioner that her indefinite contract could not be the subject of regulation in the public interest in a manner similar to that recognized as regulative and not destructive under the doctrine of *Grand Trunk Western Railroad Company* v. *South Bend,* 227 U. S. 544, 554, 555, where this Court said:

> "The power to regulate implies the existence and not the destruction of the thing to be controlled."

In this connection there must be noted the broad grounds, representing almost every conceivable cause for which the public interest could possibly require the dismissal of the teacher provided under section 2 of the act. The enumeration of these grounds concludes with "or other good and just cause." Under this phrase any cause which injuriously affects or prevents successful teaching or the successful functioning of the school system and involving the con-

tinuance of the teacher in her employment could after notice and hearing be made the basis of her removal under the Act. Indeed the State Supreme Court in *Stiver* v. *State ex rel. Kent*, 1 N. E. Reporter (2d), 1006, 1008 has held:

> "other good and just cause" would include any cause which bears a reasonable relation to the teacher's "fitness or capacity to discharge the duties of his position."

It is plain that the only effect achieved by the enactment of the amendatory act beyond the destruction of existing contracts is the abolition of hearing and notice before dismissal and the renewed permissibility of dismissals for personal and political reasons. Certainly the provisions thus abolished are to the public advantage and cannot possibly be to the public disadvantage.

If desirable the retention or discontinuance of a teacher's employment attainable since the amendment was attainable before, and the only net result of the statute is the loss to the permanent teachers in the rural schools of their indefinite contracts. Thus analyzed the present case is clearly within *Treigle* v. *Acme Homestead Association*, 297 U. S. 189, and is arbitrary and oppressive. This case is not unlike *Adams* v. *Tanner*, 244 U. S. 590, 596, where it is said that an act "having no just relation to the protection of the public within the scope of legislative power must fail."

In *Adams* v. *Tanner* it was held the employment agency business could not be prohibited but could be regulated only since it was not shown that reasonable regulations would not prevent the evils complained of.

In *Panhandle Eastern Pipe Line Co.* v. *State Highway Commissioners*, 294 U. S. 613, 622, Mr. Justice McReynolds, speaking for the Court, said:

> "The police power of a state, while not susceptible of definition with circumstantial precision, must be

exercised within a limited ambit and is subordinate to constitutional limitations. It springs from the obligation of the state to protect its citizens and provide for the safety and good order of society. Under it there is no unrestricted authority to accomplish whatever the public may presently desire."

Petitioner's case seems to fall within the rule laid down in *Treigle* v. *Acme Homestead Association,* 297 U. S. 189, 196, 197, where speaking for the Court, Mr. Justice Roberts said:

"Such an interference with the right of contract cannot be justified by saying that in the public interest the operations of building associations may be controlled and regulated, or that in the same interest their charters may be amended. The statute merely attempts, for no discernible public purpose, the abrogation of contracts between members and the association lawful when made. This cannot be done under the guise of amending the charter powers of the corporation. Compare Bedford *v.* Eastern Bldg. & L. Asso., 181 U. S. 227, 45 L. Ed. 834, 21 S. Ct. 597." * * *

"Though the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised for an end which is in fact public, and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive."

In the recent case of *W. B. Worthen* v. *Thomas,* 292 U. S. 426, 431, 432, Chief Justice Hughes quotes with approval the observation of Justice Marshall in *Sturges* v. *Crownshield,* 4 Wheat. 122, 128:

"* * * it is not true that parties have in view only the property in possession, or that its obligation does not extend to future acquisitions. Industry, talents and integrity constitute a fund which is as confidently trusted as property itself. Future acquisitions are

therefore liable for contracts; and to release them from this liability impairs their obligation."

A school teacher contracts her skill and educational investment, represented in her training, and the State inviting her to place this investment at its service by the inducement of an indefinite contract is certainly in no better position to impair that contract than to impair an indeterminate franchise with a corporation. The present situation is clearly one which should receive thoughtful consideration to prevent the police power being perverted to its own destruction, as well as being applied in an arbitrary and oppressive manner. The improvement of the educational system by stabilizing the tenure of teachers through the instrumentality of an indefinite contract, cancellable only after hearing and notice and never for personal or political reasons, has been sought in Indiana and several other States. The means used can be assimilated to the indefinite franchise commonly employed to attract and secure investment in public utilities. In this field the contract clause has operated with efficacy as against over-extension of the police power. The State has not been considered to lack capacity to bind itself as against infringement of the contract clause. Under the decision of the Court below the same and through the same instrumentality of contract cannot be accomplished in the educational field. According to this opinion the incapacity of the State effectually prevents its being able to offer the security against its own change of mind necessary to induce the investment of pedagogical talent and special training for the instruction of its youth, although the State is not thus incapacitated through its sheer sovereign power to attract and secure the investment of money. Moreover the view taken below sustains the sudden, simultaneous destruction of the contracts of many thousand permanent teachers throughout Indiana, without any compensation for the contractual rights thus lost. The case is within the

observation of Justice Holmes quoted above as to the proper limits of the police power as contrasted with the contract clause and the right to compensation.

The issues here involved are of wide interest. Not only the future of the tenure contract method of procuring efficiency through stabilizing the employment of a teacher is directly involved, but the contractual pecuniary interests of permanent teachers of other states are likewise involved.

Also, the decision of this case will affect the decision of the Supreme Court of Wisconsin, rendered June 21, 1926, in *State ex rel. Nyberg* v. *Board of School Directors of Milwaukee,* 190 Wis. 570, where it was held that the Teachers' Tenure Act of that state created contract rights within the protection of the contract clause of the Constitution.

If the contract clause is to persist as an efficacious means of preventing the impairment of the obligations of a contract of a sovereign State as against the attempted exercise of the police power, the clearly recognized social value of the object to be achieved by a system of teachers' tenure contracts should turn the scale in favor of the operation of the contract clause in the present instance. Willis Constitutional Law, page 745, quoted by Judge Treanor in the dissenting opinion (R. 27).

**(4) The court erred in holding that the Amendatory Act of 1933, construed by the court below to abrogate the petitioner's contract as a permanent teacher, was not in conflict with the contract clause of Article I, Section 10 of the Constitution of the United States.**

The argument above under (3) fully covers this proposition.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory

powers, by granting a writ of certiorari, and thereafter reviewing and reversing said decision.

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## APPENDIX A.

### Indiana Teachers' Tenure Act 1927—Indiana Acts 1927, Page 259.

AN ACT defining teachers and permanent teachers, providing for their employment and release, and defining, and providing for the making and cancelling of, indefinite contracts.

(Approved March 8, 1927.)

SECTION 1. Be it enacted by the general assembly of the State of Indiana, That any person who has served or who shall serve under contract as a teacher in any school corporation in the State of Indiana for five or more successive years, and who shall hereafter enter into a teacher's contract for further service with such corporation, shall thereupon become a permanent teacher of such school corporation. The term "teacher" as used in this section shall mean and include licensed public school teachers, supervisors and principals of all public school corporations, and licensed assistant superintendents and superintendents of school cities and towns. Upon the expiration of any contract between such school corporation and a permanent teacher, such contract shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract. Such an indefinite contract shall remain in force unless succeeded by a new contract signed by both parties or unless it shall be cancelled as provided in section 2 of this act: Provided, That teachers' contracts shall provide for the annual determination of the date of the beginning and length of school terms by the school corporation: and, Provided, further, That teachers' contracts may contain provisions for the fixing of the amount of annual compensation from year to year by a salary schedule adopted by the school corporation and such schedule shall be deemed to be a part of such contract; and, Provided, further, That such schedule may be changed by such school corporation on or before May 1st of any year, such changes to become effective at the beginning of the following school year: Provided, That all teachers affected by such changes shall

be furnished with printed copies of such changed schedule within thirty days after its adoption.

SECTION 2. Any indefinite contract with a permanent teacher as defined in section 1 of this act may be cancelled only in the following manner: Not less than thirty days nor more than forty days before the consideration by any school corporation of the cancellation of any such contract, such teacher shall be notified in writing of the exact date, time when and place where such consideration is to take place; and such teacher shall be furnished a written statement of the reasons for such consideration, within five days after any written request for such statement; and such teacher shall, upon written request for a hearing, filed within fifteen days after the receipt by said teacher of notice of date, time and place of such consideration, be given such a hearing before the school board, in the case of cities and towns, and before the township trustee, in the case of townships; such hearing shall be held not less than five days after such request is filed and such teacher shall be given not less than five days' notice of the time and place of such hearing. Such teacher, at the hearing, shall have a right to a full statement of the reasons for the proposed cancellation of such contract, and shall have a right to be heard, to present the testimony of witnesses and other evidence bearing upon the reasons for the proposed cancellation of such contract. No such contract shall be cancelled until the date set for consideration of the cancellation of such contract; nor until after a hearing is held, if such hearing is requested by said teacher; nor until, in the case of teachers, supervisors, and principals, the city or town superintendents, in cities and towns, and the county superintendents, in townships and in cities and towns not having superintendents, shall have given the school corporation his recommendations thereon, and it shall be the duty of such superintendent to present such recommendations upon five days' written notice to him by such school corporation. Nothing contained in this section shall prevent the suspension from duty of any teacher pending a decision on the cancellation of such teacher's contract. Cancellation of an indefinite contract of a permanent teacher may be made for

incompetency, insubordination (which shall be deemed to mean wilful refusal to obey the school laws of this state or reasonable rules prescribed for the government of the public schools of such corporation), neglect of duty, immorality, justifiable decrease in the number of teaching positions or other good and just cause, but may not be made for political or personal reasons: Provided, That when the cause of cancellation of an indefinite contract is immorality or insubordination, as defined in this act, such cancellation shall go into effect at once: and, Provided, further, That when the cause of cancellation of an indefinite contract is not immorality or insubordination, as defined in this act, such cancellation shall go into effect at the end of the school term following such cancellation. The school board of any city or town, by a majority vote, evidenced by a signed statement in the minutes of the board, or the township trustee, by a written and signed statement recorded in his records, may cancel an indefinite contract with a teacher after compliance with the provisions of this section: Provided, That the decision of the school board shall be final: and, Provided, further, That the decision of the township trustee shall not become effective for ten days, during which time an appeal may be taken to the county superintendent, in which case the county superintendent shall investigate the case and make a final decision within five days.

SECTION 3. No teacher shall be appointed by any school corporation in Indiana, and no teacher shall become a permanent teacher in any such school corporation, until the superintendent, in the case of school cities and school towns, and the county superintendent, in the case of townships and school cities and towns not having superintendents, shall have made a report upon such teacher's preparation, experience, and license, and it shall be the duty of every such superintendent, within ten days after request, to make such report upon any person whom the school corporation is considering as an applicant: Provided, That nothing contained in this section shall be deemed to prevent the granting to any superintendent of additional authority in the selection and employment of

teachers either by law or by the rules or regulations of any school corporation.

SECTION 4. No permanent teacher shall be permitted to cancel his indefinite contract during the school term for which his said contract is in effect nor for a period of thirty (30) days previous to the beginning of such school term unless such cancellation is mutually agreed upon; such permanent teacher shall be permitted to cancel his indefinite contract at any other time by giving a five days' notice to the school corporation. Any permanent teacher cancelling his indefinite contract in any other manner than in this section provided shall be deemed guilty of unprofessional conduct and the state superintendent is hereby authorized to suspend the license of such teacher for a period of not exceeding one year.

SECTION 5. Any school corporation, upon written request, may grant leaves of absence, for periods not exceeding one year, to any permanent teacher for study or professional improvement or because of physical disability or sickness, subject to such rules and regulations governing leave of absence as may be adopted by such corporation: Provided, That without written request any school corporation may place a permanent teacher on leave of absence for periods of not exceeding one year because of physical or other disability or sickness: Provided, That such teacher shall have a right to a hearing on such unrequested leave of absence in accordance with the provisions for hearings contained in section 2 of this act.

SECTION 6. This act shall be construed as supplementary to an act of the general assembly, page 195, acts 1921, entitled, "An act concerning teachers' contracts and providing for the repeal of conflicting laws."

## APPENDIX B.

**The New Jersey Act (as Quoted in Phelps v. Board of Education of Town of West New York, 57 Sup. Ct. Rep. 483).**

SECTION 1 (4 N. J. Comp. St. 1910). The service of all teachers, principals, supervising principals of the public schools in any school district of this state shall be during good behavior and efficiency, after the expiration of a period of employment of three consecutive years in that district, unless a shorter period is fixed by the employing board; * * * No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her * * * and after the charge shall have been examined into and found true in fact by said Board of Education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing. * * *

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## APPENDIX C.

**Teachers' Contracts Required to be in Writing.**

(Chapter 91, Sec. 1, p. 195 of the Acts of General Assembly of Indiana, 1921, Burns' Indiana Stat. Ann. 1933, Sec. 28-4304).

AN ACT concerning teachers' contracts and providing for the repeal of conflicting laws.

(S. 143. Approved March 7, 1921.)

SECTION 1. Be it enacted by the general assembly of the State of Indiana, That all contracts hereafter made by and between teachers and school corporations shall be in writing; shall state the date of the beginning of the school term; the number of months in the school term; the total amount of the salary to be paid during the school year;

and the number of payments that shall be made during the school year; provided that in this act, a month shall mean not more than twenty school days.

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## APPENDIX D.

### Teachers' Minimum Wage Act.

Chapter 56, Acts of 1920, Special Session, p. 194. (Burns' Ind. Stats. Ann. 1933, Section 28-4314).

AN ACT to amend an act to amend section 1 of an act entitled "An act to amend an act entitled 'an act to amend section 1 of an act entitled an act to classify and regulate the minimum wage of teachers in public schools', approved March 2, 1907, approved March 1, 1911, and to amend section 2 of an act entitled 'an act to classify and regulate the minimum wages of teachers in public schools', approved February 28, 1913, approved March 15, 1919."

(H. B. 553. Approved August 4, 1920.)

SECTION 1. Be it enacted by the general assembly of the State of Indiana, That section 1 of the above entitled act be amended to read as follows: Section 1. That the daily wages of teachers for teaching in the public schools of the state shall not be less in the case of beginning teachers, than an amount determined by multiplying four and one-fourth cents by the general average given such teacher on his highest grade of license at the time of contracting. For teachers having had a successful experience for one school year of not less than six months, the daily wages shall be not less than an amount determined by multiplying four and three-fourths cents by the general average given such teacher on his highest grade of license at the time of contracting. For teachers having had a successful experience of three or more school years of not less than six months each, the daily wages shall be not less than an amount determined by multiplying five and one-half cents by the general average given such teacher on his highest grade of license at the time of contracting. For teachers having had a successful experience of five or more school years of not

less than six months each, the daily wages shall be not less than an amount determined by multiplying six cents by the general average given such teacher on his highest grade of license at the time of contracting. All teachers now exempt from examination shall be paid, as daily wages for teaching in the public schools, not less than an amount determined by multiplying six and one-half cents by the general average of scholarship and success given such teacher: Provided, That the grade of scholarship accounted in each case be that given at the teacher's last examination, and that the grade of success accounted, be that of the teacher's term last preceding the date of contract: And Provided further, That two per cent shall be added to the teacher's general average scholarship and success for attending the county institute the full number of days, and that said two per cent shall be added to the average scholarship of beginning teachers: Provided further, That the minimum paid to any teacher in the common schools of this state shall not be less than $800 per school year.

---

Service of the above and foregoing petition for certiorari and brief in support thereof and receipt of a copy of each is hereby acknowledged and accepted at ——, this — day of ——, 1937.

——— ———,

*Counsel for Respondent, Harry Brand,*
*Trustee of Chester School Township,*
*of Wabash County, Indiana.*

Service of the above and foregoing printed copy of the record and the receipt and a copy thereof is hereby acknowledged and accepted at ——, this — day of ——, 1937.

——— ———,

*Counsel for Respondent, Harry Brand,*
*Trustee of Chester School Township,*
*of Wabash County, Indiana.*

## Affidavit of Service.

UNITED STATES OF AMERICA,
*District of Indiana,*
*State of Indiana, ss:*

—— ——, first being duly sworn deposes and says that he is of lawful age and that on the — day of ——, 1937, he personally delivered to and served the above —— ——, counsel for the respondent Harry Brand, Trustee of Chester School Township of Wabash County, Indiana in the foregoing cause by delivering to and leaving with said counsel for said respondent a copy of petitioner's petition for writ of certiorari, petitioner's brief in support thereof and a printed copy of the record in said cause at ——, in Vigo County in said District.

—— ——.

Subscribed and sworn to before me the undersigned —— ——, at ——, in said District, County and State this — day of ——, 1937.

—— ——,
*Notary Public.*

My commission expires —— —, ——.

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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

No. 256.

STATE OF INDIANA on the Relation of
DOROTHY ANDERSON,
Petitioner,

vs.

HARRY BRAND, Trustee of CHESTER SCHOOL TOWNSHIP OF WABASH COUNTY, INDIANA.

## PETITIONER'S BRIEF.

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Introduction to the Philosophy of Law (Pound, pp. 237, 272, 273, 274, 275, 276, 279)..... 20
Pollock on Contracts, p. 191 (8th Ed.)..... 20
Selected Readings on the Law of Contracts, Assoc. Am. Law Schools, 434, 448, 450..... 20
Williston on Contracts, Rev. Ed. 1936, pp. 365, 366.. 38

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

No. 256.

STATE OF INDIANA on the Relation of
DOROTHY ANDERSON,
Petitioner,

vs.

HARRY BRAND, Trustee of CHESTER SCHOOL TOWNSHIP OF WABASH COUNTY, INDIANA.

## PETITIONER'S BRIEF.

### I.

### OPINIONS OF THE COURT.

(a) The first majority opinion of the Supreme Court of the State of Indiana is reported in 5 N. E. (2d) 531, Cause No. 26,560 (R. pp. 13, 14 and 15).

(b) The majority opinion of the State Supreme Court rendered upon petitioner's petition for rehearing is reported in 7 N. E. (2d) 777, in the same cause (R. pp. 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28).

(c) The dissenting opinion of Judge Treanor is reported in 5 N. E. (2d) 913 (R. pp. 31, 32, 33 and 34).

The official reports of these opinions have not yet been published.

## II.

## STATEMENT OF THE CASE.

On April 16, 1934, petitioner brought an action in mandate in the Wabash Circuit Court in Wabash County, Indiana, against the respondent, Trustee of Chester School Township of Wabash County, Indiana, to compel the respondent to recognize her continuing contract with the school township to teach in the schools thereof in accordance with the provisions of Chapter 97 of the Acts of the General Assembly of Indiana for 1927 (Indiana Acts of 1927, page 259) commonly known as the Teachers' Tenure Act of 1927 and hereinafter referred to by that title or as the Act of 1927 (Appendix B, p. 58, this brief).

This act provided in section 1:

> "Be it enacted by the General Assembly of the State of Indiana, That any person who has served or who shall serve under contract as a teacher in any school corporation in the State of Indiana for five or more successive years, and who shall hereafter enter into a teacher's contract for further service with such corporation, shall thereupon become a permanent teacher of such school corporation. The term 'teacher' as used in this section shall mean and include licensed public school teachers, supervisors and principals of all public school corporations, and licensed assistant superintendents and superintendents of school cities and towns. Upon the expiration of any contract between such school corporation and a permanent teacher, such contract shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract. Such an indefinite contract shall remain in force unless succeeded by a new contract signed by both parties or unless it shall be canceled as provided in section 2 of this act: * * *"

Section 6 of this Act of 1927 expressly declared the act to be "supplementary" to an Act of 1921, p. 195, Act 3 of 1921 set out in Appendix B, p. 58, this brief, which expressed all contracts between teachers and school corporations to be in writing.

The controversy arose after the petitioner had taught continuously in the schools of respondent since 1924 under successive contracts and had completed the school year of 1932-1933 under her continuing indefinite contract described in Section 1, of the Indiana Teachers' Tenure Act of 1927, and after the enactment of the Teachers' Tenure Act of 1933, being Chapter 116 of the Indiana Acts of 1933, beginning at page 716, referred to hereafter as the Act of 1933 or the Amendatory Act.

This Act of 1933 differs from the Act of 1927 in three respects only, namely, omitting therefrom all reference to school township corporations, though retaining all other corporations within its terms, adding to the act a provision theretofore contained in a separate statute requiring uniform contracts and that the form and wording be prescribed by the State Superintendent of Public Instruction, and also fixing for the first time an age limit of teachers at 66 years.

This Amendatory Act appears in Appendix D, p. 64, of this brief.

It is claimed on behalf of the respondent that the Act of 1933 abrogated the employment relationship between petitioner and respondent and that he was therefore under no contractual obligation to respect the continuing contract of the petitioner.

The petitioner on the other hand insists that her tenure contract is a continuing contractual obligation on the part of the respondent and can be canceled only as provided

in the act, and that this continuing contractual obligation is within the protection of the provisions in Article 1, section 10, of the Constitution of the United States forbidding the impairment of the obligation of contracts.

### (a) The Petitioner's Complaint.

After alleging her qualifications as the holder of a life license issued by the duly constituted authorities of the State of Indiana to teach primary grades in the schools of this state, the petitioner charged therein:

> "That in September, 1924, under a contract with Chester School Township of Wabash County, Indiana, this relatrix began to teach primary grades in the school maintained at Servia, Indiana, by said Chester Township of Wabash County, Indiana. That under successive contracts thereafter plaintiff's relatrix taught in the schools of said Chester School Township of Wabash County, State of Indiana, until the year of 1932-1933 continuously and taught more than five years prior to the said school year of 1932-1933. That the contracts for the school year of 1931-1932 and 1932-1933 contained in the clause as follows, to wit: 'It is further agreed by the contracting parties that all of the provisions of the Teachers' Tenure Law, approved March 8, 1927, shall be in full force and effect in this contract' " (R. p. 1).

The petitioner charged facts showing the attempted illegal cancellation of her indefinite contract as a permanent teacher contrary to the provisions of the Teachers' Tenure Act approved March 8, 1927, and also alleged that she was permitted to continue to teach under her indefinite contract for the years 1933-1934.

The complaint then charged:

> "That said defendant has stated that he will not

reinstate this relatrix as a permanent teacher in the schools of said Chester School Township and that her employment would end at the end of the school year of 1933-1934, which school year ends in April, 1934" (R. p. 3).

The petitioner's complaint concluded with the following prayer:

"Wherefore, plaintiff sues and prays that said defendant be mandated to continue the employment of this relatrix as a teacher in the schools operated by said defendant in Chester School Township of Wabash County, State of Indiana; and for all other relief right and proper" (R. p. 4).

The Wabash Circuit Court sustained the respondent's demurrer to petitioner's complaint, which demurrer appears in the record on pages 5, 6 and 7, and on October 24, 1934, rendered judgment accordingly against petitioner (R. p. 7).

(b) **The Issues in the State Supreme Court.**

As appears from the majority opinions of the Supreme Court the only grounds contained in the memorandum attached to the demurrer considered by the Supreme Court were the following:

"That the complaint shows that the action is based upon Section 1 of an Act of the Legislature of the State of Indiana, approved March 8, 1927, which said statute was repealed by the Legislature of the State of Indiana in so far as it applied to school teachers' tenure law in townships in said state.

"That the plaintiff's action is founded upon a statute which has been repealed by the Legislature of the State of Indiana, and there was not, at the time of the

filing of this suit, any law in force in said State of Indiana under which this action can be maintained" (R. p. 6).

All the issues which were considered by the Supreme Court of Indiana on the original hearing in that court are set forth in the first two paragraphs of the first majority opinion as follows:

"Fansler, J.: By this action it is sought to mandate appellee to continue relatrix in the employ of the township as a school teacher under the Act of 1927 (Acts 1927, c. 97, p. 259), which provides that a person who has served for five or more successive years as a teacher, and shall thereafter enter into a contract for further service, shall become a permanent teacher. The act was amended in 1933 (Acts 1933, c. 116, p. 716; Burns' Ann. St. 1933, Sec. 28-4307), and made to apply to city and town school corporations only. Townships, to which the act originally applied, were omitted in the amendment, which had the effect of repealing the law so far as township schools and the teachers therein are concerned.

"A demurrer to the complaint was sustained. The relatrix contends that this was error; that, having become a permanent teacher under the Teachers' Tenure Law before the amendment, she had a vested property right in her indefinite contract, which may not be impaired under the Constitution. The question is whether there is a vested right in a permanent teacher's contract; whether, under the tenure law there is a grant which cannot lawfully be impaired by a repeal of the statute" (R. p. 13).

In the petitioner's petition for rehearing before the Supreme Court of Indiana, she set forth substantially the same grounds and assignments of errors as are herein set out and relied upon. The Court below considered this

petition and in a majority opinion overruled the same, saying, in part:

> "On petition for rehearing, appellant earnestly contends that the decision of this case gives a retroactive effect to a statute, and permits the impairment of the obligation of a binding contract." "The original opinion was intended to be understood as expressing the view that no contractual right to be continued as a teacher from year to year is involved" (R. p. 31).

This opinion is further supplemented by a certificate signed by the Chief Justice and all the Judges of the Supreme Court of Indiana, and which contains the following recital:

> "A demurrer to the complaint was sustained. The relatrix contends that this was error; that, having become a permanent teacher under the Teachers' Tenure Law before the amendment, she had a vested property right in her indefinite contract, which may not be impaired under the Constitution.
>
> "In the opinion the word 'Constitution' referred to, and was intended to mean, Article I, Section 10, of the Constitution of the United States of America" (R. p. 34).

The appellant appealed from a judgment sustaining respondent's demurrer in the trial court (R. p. 7). The Supreme Court of Indiana affirmed this judgment.

### (c) Statutes Involved or Related.

(a) In Appendix A, Section 2, of Chapter 111 of the Acts of the General Assembly of Indiana for 1899, page 173 (Burns' Ind. Stat. Ann. 1933, Section 28-4303), "concerning uniform contracts and the recording thereof.

(b) In Appendix B, Section 1, chapter 91, page 195, Ind. Acts 1921, Burns' Ind. Stat. Ann. 1933, Section 28-4304.

(c) Section 2, Chapter 92, page 430, of the Acts of the General Assembly of Indiana of 1852, being Burns' Ind. Stat. Ann. 1933, Section 1-302, reading as follows:

> "No rights vested, or suits instituted, under existing laws shall be effected by repeal thereof, but all such rights may be asserted and such suits prosecuted as if such laws had not been repealed."

(d) In Appendix C, the Teachers' Tenure Act of 1927, being Sections 1, 2, 3, 4, 5 and 6 of Chapter 97 of the Acts of the General Assembly of Indiana for 1927 (Burns' Ind. Stat. Ann. Supp. 1929, Section 6967.1).

(e) In Appendix D, the Teachers' Tenure Act of 1933 (Amendatory of the Act of 1927), being Sections 1, 2, 3, 4 and 5 of Chapter 116, of the Acts of the General Assembly of Indiana for 1933, beginning at page 716 (Burns' Ind. Stat. Ann. 1933, Section 28-4307).

Both Section 6 of the said Act of 1927 and Section 5 of said Act of 1933 provided:

> "This act shall be construed as supplementary to an Act of the General Assembly, page 195, Acts 1921, entitled, 'An Act concerning teachers' contracts and providing for the repeal of conflicting laws.' "

(f) In Appendix E the Teachers' Minimum Wage Act, Chapter 56, Section 1, Acts of Special Session of 1920, page 194 (Burns' Ind. Stat. Ann. 1933, Section 28-4314, including title thereto).

(g) In Appendix F the Act of the Legislature of New Jersey, as quoted in Phelps v. Board of Education of Town of West New York, 57 Sup. Ct. Rep. 483.

(d)

No question of the propriety of mandamus as the proper remedy was made below. However, under the decisions in Indiana it is held:

> "That if a contractual right is so inseparably bound with an imperative duty laid upon public officials by law as to require the performance of the duty of the officers to further or secure such rights, mandamus may be invoked to coerce official action."
>
> Board of Trustees v. State (1911), 175 Ind. 147 (93 N. E. 851);
>
> State ex rel. City of Marion v. Marion Light & Heating Co. (1910), 174 Ind. 622 (92 N. E. 731).

This remedy has also been recognized as available for the enforcement of tenure teachers' contracts under the Act of 1927 in cases decided prior to State ex rel. Anderson v. Brand case, now reviewed.

> School City of Elwood v. State ex rel. Griffin (1932), 203 Ind. 626, 634 (180 N. E. 471, 473);
>
> Kostanzer v. State ex rel. Ramsey (1933), 187 N. E. 392, 205 Ind. 536.

No question was raised or considered below that petitioner's complaint was a sufficient allegation of the execution of her contract in writing. It had previously been held by the Indiana Supreme Court that the allegation that a teacher's contract was entered into necessarily meant in view of the statute requiring the same to be in writing was a sufficient allegation of a written contract.

> Brumfield v. State ex rel. Wallace (1934), 206 Ind. 647 (190 N. E. 863, 867).

There exists no provision in the Constitution of Indiana limiting or qualifying the power of the State of Indiana or its agents to enter into a contract with the teacher and likewise no general or special statute to that effect, excepting only the Act of 1899 and of 1921, referred to above, requiring the teacher's contract to be in writing.

## III.

## SPECIFICATIONS OF ERROR.

(1) The Court erred in holding that the employment relationship existing by virtue of petitioner's indefinite contract under Section 1 of the Indiana Teachers' Tenure Act of 1927 (Indiana Acts of 1927, Chap. 97) was not a contract.

(2) The Court erred in holding that the petitioner's indefinite contract entered into by and between the petitioner and the respondent under the Indiana Teachers' Tenure Act of 1927, being Chapter 97 of the Acts of the General Assembly of Indiana, for the year 1927, was not a continuing contract until canceled as in said act provided, but a contract for the current year only.

(3) The Court erred in holding that the continuing contract of the petitioner under Section 1, Chapter 97 of the Indiana Acts of 1927, did not constitute a contract within the meaning of the clause in Section 10 of Article I of the Constitution of the United States forbidding a state to pass any law impairing the obligation of a contract.

(4) The Court erred in holding that the repeal of the Indiana Teachers' Tenure Act of 1927, Chapter 97, Indiana Acts of 1927, in so far as it affects townships and township schools, permits the township school corporation to impair the obligation of contracts that had ripened into permanent teachers' contracts under the prior law, notwithstanding the provisions of Section 10 of Article I of the Constitution of the United States forbidding any state to pass a law impairing the obligation of contracts.

(5) The Court erred in holding that petitioner's con-

tract with respondent was not within the protection of the provisions of Article I, Section 10, of the Constitution of the United States forbidding a state to pass any law impairing the obligation of contracts.

(6) The Court erred in denying the right, claimed by petitioner based upon the clause in Article I, Section 10, of the Federal Constitution forbidding the impairment of the obligation of contracts, to continue to hold, enjoy and enforce her subsisting permanent teacher's contract, consisting of the provisions of the Indiana Teachers' Tenure Act of 1927 and her written contract, notwithstanding the impairing effect thereon given to the Indiana Amendatory Act of 1933 (Indiana Acts of 1933, Chapter 116), as construed by the Supreme Court of Indiana in the judgment herein sought to be reviewed.

(7) The Court erred in holding that the Amendatory Act of 1933, being Chapter 116 of the Indiana Acts of 1933, construed by the court below to abrogate the petitioner's contract as a permanent teacher, was not in conflict with the clause of Section 10 of Article I of the Constitution of the United States, forbidding a state to pass any law impairing the obligation of contracts.

## IV.

## SUMMARY OF ARGUMENT.

### A.

### THE CONSTRUCTION OF THE STATUTE INVOLVED.

#### 1.

The Indiana Teachers' Tenure Act of 1927 manifests a clearly expressed intention to establish contractual relations with "permanent teachers." This plainly appears from the following:

(a) The title of the Indiana Teachers' Tenure Act of 1927. Appendix C, p. 59, this brief.

(b) The title of Chapter 91, Section 1, page 195, Acts of 1921 (Burns' Ind. Stat. Ann. 1933, Sec. 28-4304), entitled "An Act concerning teachers' contracts and providing for the repeal of conflicting laws," to which the Act of 1927 is expressly, in section 6 thereof, declared to be "supplementary." Appendix B, p. 58, this brief.

(c) Section 6 of said Act of 1927.

(d) The recurring use of the word "contract" throughout the Act of 1927, in section 1 ten times; in section 2 eleven times; in section 4 four times.

(e) The Indiana Act of 1899, Acts of 1899, page 173, sections 1 and 2 of which were re-enacted in the above Act of 1921, providing "that all contracts hereafter made by and between teachers in a school corporation in the State of Indiana shall be in writing, signed by the parties to be charged thereby * * *."

(f) The Act of March 8, 1873, Chapter 25, Section 9, page 75 of the Acts of 1873, providing, "The township trustee shall specify in a written contract with each teacher that such teacher shall attend the full session of each institute."

Also prior acts of the General Assembly of Indiana expressly indicating a contractual relationship in that such statutes required the teacher to be "employed."

Act March 5, 1855, Chapter 148, Section 107 (Gaven v. Hord, Indiana Statutes 1860);
Act March 6, 1865, page 3, Section 28 (Burns' 1881, Section 4501);
Act March 3, 1871, Chapter 25, Section 5, Clause 5, pp. 20-22.

(g) Section 1-201, Clause 1, Burns' Ind. Stat. Ann. 1933, being an act continuously in force since 1852, prescribing a rule for the construction of all statutes that "words and phrases shall be taken in their plain or ordinary and usual sense."

2.

The Act of 1927 expressly declares the intention of the Legislature to establish continuing contractual relations with permanent teachers. This appears from the following:

(a) The express declaration contained in Section 1 of the Act of 1927:

> "That such contract shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract. Such an indefinite contract shall remain in force unless succeeded by a new contract signed by both parties or unless it shall be canceled as provided in Section 2 of this Act * * *."

(b) The ultimate object of this type of legislation, namely, to improve and develop the efficiency of the schools and improve the education of the children therein by stabilizing the employment of teachers, and relieving them of fear of discharge on political or nonprofessional grounds.

Contracts binding the school corporation for a year only could not carry out this object and hence a construction of the act viewing the contracts as binding the school corporation from year to year only would frustrate the accomplishment of the object of the statute.

3.

Where the language of a statute is plain and unambiguous it must be held to mean what it plainly expresses.

United States v. Standard Brewery Inc. (1919), 251 U. S. 210, 217, 64 Law. ed. 229, 234;
United States v. Missouri Pac. Ry. Co. (1928), 278 U. S. 269, 277, 278, 73 Law. ed. 322, 376;
Cheney v. State (1905), 165 Ind. 121 (74 N. E. 892);
Fessler v. Bosson (1920), 189 Ind. 484 (128 N. E. 145);
Peabody Alwert Coal Co. v. Yandell (1913), 179 Ind. 222 (100 N. E. 758);
Hyand v. Rochelle (1913), 179 Ind. 671 (100 N. E. 842);
Cain v. Staley Mfg. Co. (1935), 97 Ind. App. 235 (186 N. E. 265).

Where the words of the statute are free from ambiguity and its purpose plain then the courts have no power to create exceptions thereto by construction.

Commissioner of Immigration v. Gottlieb et al. (1923), 265 U. S. 310, 313 (68 Law. ed. 1031, 1033);

United States v. Thompson (1927), 246 U. S. 457, 551 (62 Law. ed. 876, 879);
Pittsburgh C. C. & St. L. Ry. Co. v. Parker (1922), 191 Ind. 868 (134 N. E. 890).

Consequently, when the Act of 1927 declared, referring to the contract with a permanent teacher "such contracts shall be deemed to continue in effect for an indefinite period," and, further, "such an indefinite contract shall remain in force unless succeeded by a new contract signed by both parties or unless it shall be canceled," as provided in the act, both the contractual nature and the continuing force of the contract thus declared in terms are thereby placed beyond the power of judicial interpretation to construe as binding on the school corporation only from year to year.

4.

The language of a statute should be construed to avoid defeating the legislative purpose if that can be done by a reasonable and natural construction of the language used.

Crittenberger v. State Savings & Trust Co. (1920), 127 N. E. 522.

The true object of all statutory interpretations is to ascertain the meaning and will of the law-making body, and it is not permissible, under the pretense of interpretation, to make a law, either by extension or restriction, which shall depart from the legislative intent.

J. Wooley Coal Co. v. Tevault (1918), 187 Ind. 171 (119 N. E. 485).

5.

A continuing contract was the device and instrumentality chosen by the Legislature to accomplish its object of stabilizing the employment of teachers.

Arburn v. Hunt (1934), 207 Ind. 61 (191 N. E. 148, 149);
Ratcliffe v. Dick Johnson School Twp. (1933), 204 Ind. 525 (185 N. E. 143);
School City of Elwood v. State ex rel. Griffin (1932), 203 Ind. 626 (180 N. E. 471);
Kostanzer v. State (1933), 205 Ind. 536 (187 N. E. 307, 341).

6.

In many decisions of the appellate tribunals of the state prior to the enactment of the Teachers' Tenure Act of 1927 recovery was permitted by the school teacher on the theory that her employment was contractual.

Harrison School Tp. v. McGregor, 96 Ind. 185;
Kiefer v. Troy School Tp., 102 Ind. 279;
Morrison v. McFarland, 51 Ind. 206;
Schwier v. Zitike, 136 Ind. 210;
Charlestown School Tp. v. Hays, 74 Ind. 127;
Sparta School Tp. v. Menell, 138 Ind. 188 (37 N. E. 1059);
School Town of Carthage v. Gray, 10 App. 428 (37 N. E. 1059);
Henry School Tp. v. Meredith, 32 App. 607 (70 N. E. 393);
Waltz School Tp. v. Derck, 74 App. 700 (29 N. E. 414);
School Town of Milford v. Zeigler, 1 App. 138;
Gregg School Tp. v. Hinshaw, 76 App. 503 (132 N. E. 586);
School City of Lafayette v. Bloom, 17 App. 461.

The contractual nature of the relationship enjoyed by teachers holding indefinite contracts under the Act of 1927 was recognized in all decisions under that act until the rendition of State ex rel. Anderson v. Brand, Trustee, being reviewed herein.

State ex rel. Clark v. Stout, 206 Ind. 58 (187 N. E. 267);
Kostanzer v. State ex rel. Ramsey, 205 Ind. 536 (187 N. E. 337);
State ex rel. Black v. Board of School Comrs., 205 Ind. 582 (187 N. E. 392);
Barnes v. Mendenhall, 98 Ind. App. 229 (183 N. E. 556);
School City of Elwood v. State ex rel. Griffin, 203 Ind. 626 (180 N. E. 471);
School City of Evansville v. Culver, 94 Ind. App. 692 (182 N. E. 270);
Brumfield v. State ex rel. Wallace (1934), 206 Ind. 647 (190 N. E. 863-867).

7.

The view expressed in the majority opinion on rehearing below relying on Davis v. Davis, Director (1926), 197 Ind. 386 (151 N. E. 134), and Kostanzer et al. v. State ex rel. Ramsey (1933), 205 Ind. 536, 548, 549 (187 N. E. 337, 342), to the effect that petitioner's contract is not binding as a continuing contract for "want of mutuality" is not sound and is not supported by the authorities cited because Davis v. Davis, Director, supra, was based on a wholly different state of facts, and the holding in the Kostanzer case is in conflict therewith.

8.

In the Court's language in the Kostanzer case rejecting the suggestion of "want of mutuality" of obligation ap-

pears the sound view that it was for the Legislature to determine what was a sufficient consideration moving from the teacher to the state and when it should be received, any common-law rules to the contrary notwithstanding. The common law must yield where it is inconsistent with the statute. Burns' Ind. Stat. Ann. 1933, section 1-101, declaring the law of the state.

Connell v. State ex rel. Thompson (1925), 196 Ind. 421 (144 N. E. 882);
Southern Railroad Co. v. Howerton (1914), 182 Ind. 208 (106 N. E. 369);
Titus v. Scantling (1935), 4 Blackford 89;
Fechheimer v. Washington (1881), 77 Ind. 366.

9.

The doctrine of consideration is merely historical, and theories with respect thereto are being developed in the direction of Lord Mansfield's proposition that no promise made as a business transaction can be nudum pactum.

Justice Holmes in 10 Harvard Law Rev. 472.

10.

The so-called "want of mutuality" relates only to considerations even from the standpoint of the common law. Moreover, the common-law rule supports the view that the elements of contract prescribed in the Teachers' Tenure Act providing that a preliminary contract for further services shall, upon the performance thereof, remain binding as a continuing contract and obliging the teacher to give a five days' written notice within a limited period each year includes a legal consideration. This view of the

common law does not lack "modern instance" in great abundance or the support of profound research.

Pilkington and others v. Scott and others (1846), Eng. Exchequer, 15 M., etc., W. 655;
Thomas v. Anthony (1916), 30 Cal. App. 217 (157 Pac. 823);
Cincinnati Exhibition Co. v. Marsans (1914), District Court of Missouri, E. D., 216 Fed. 269;
McCall v. Wright (1910), 198 N. W. 143 (91 N. E. 516), 31 L. R. A. N. S. 249;
Franklin Tel. Co. v. Harrison (1892), 145 U. S. 259;
Orbach v. Paramount Pictures Corp. (1919), 23 Mass. 281 (103 N. E. 669);
Philadelphia Ball Club v. Lajoie (1902), 202 Pa. 210, 51 Atlantic 973;
Gurfein v. Werbelovsky (1922), 97 Conn. 703 (118 Atl. 32);
Maddox Motor Car Co. v. Ford Motor Car Co. (Tex. 1930), 23 S. W. (2d) 338;
Farmers Handy Wagon Co. v. Newcomb (1916), 192 Mich. 634 (15 N. W. 152);
Pollock on Contracts, page 191 (8 ed).

Restatement of the Law, American Law Institute—last sentence in Illustration 1, page 89, Vol. 1.

The Effect of Options on Considerations—Arthur L. Corbin (34 Yale Law Journal, 371, 386, 387 [April 1925]). (See criticism of Velie Motor Car Co. v. Ford Motor Car Co. [1912], C. C. A. 71, 94 Fed. 324, in this article, page 434, in Selected Readings on the Law of Contracts, Assoc. Am. Law Schools 434, 448, 450.)

Discussion of Consideration in Introduction to the Philosophy of Law—Pound, pp. 237, 272, 273, 274, 275, 276 and 279.

11.

Under the express language of the act the contract for "further service" which the act requires following five successive years of service, preliminary to the time when the same becomes an indefinite contract, performance of this preliminary contract is clearly a consideration antecedently received by the school corporation. Moreover, under the authorities just cited, the fact that indefinite contract continues in effect until the teacher discharges the obligation he assumes to give a written five-day notice within a restricted period constitutes a legal consideration, whether viewed as a detriment to him or an advantage to his promisee.

12.

These views are consistent with the consensual nature of the contract, which is a composite of the agreement of the parties for "further service" and the statute, since both concur that under the terms of the statute such contract will upon performance operate as a statutory continuing contract.

13.

The Act of 1927 read with the Act of 1921, to which it is expressly "supplementary," plainly requires the execution of a written contract and, therefore, "the case for an obligation binding upon the state is clear."

Dodge v. Board of Education (Nov. 8, 1937), 82 Law. ed. 77, 79.

14.

Phelps v. Board of Education of the Town of West New York, 57 S. Ct. 483, holding that the New Jersey Tenure Statute there involved was not contractual does

not control. This New Jersey Act, set out in Appendix F, p. 71, this brief, not only did not employ the instrumentality or device of a contract in its tenure system, but the educational history of New Jersey did not have the same contractual background as has been shown to have existed in Indiana. The New Jersey statute did not, as does the Indiana Act to which the Indiana Teachers' Tenure Act of 1927 is supplementary, expressly require contracts to be in writing.

15.

The contract here involved is not variable as to compensation in any such manner as to vitiate the certainty of its terms. While under section 1 of the act a proviso reads: "That teachers' contracts may contain provisions for the fixing of the amount of annual compensation from year to year by a salary schedule adopted by the school corporation and such schedule shall be deemed to be a part of such contract." Nevertheless, this is merely a case of id certum est quod certum reddi potest. The fixing of a schedule is a public act of a general nature by classification of teachers reasonably and not arbitrarily made.

Hutton v. Gill (1937), 8 N. E. (2d) 818 (Ind. Sup. Ct.), holds that such schedule must be based on a reasonable, natural classification and may not be arbitrarily fixed.

16.

In Over v. Byram Foundry Co. (1906), 37 Ind. App. 452, 455, a contract was upheld in which the right to cancel at any time was unilateral. In School City of Elwood v. State, supra, it was distinctly held by the Supreme Court of Indiana in March, 1932, prior to the petitioner's last

written contract for the school year 1932-1933, that the employment of a permanent teacher under the Act of 1927 was contractual and remained contractual.

17.

When the state court has once interpreted a contract, the interpretation becomes part of the contract and any subsequent change to the injury of a contracting party impairs the obligations of the contract.

Worthen Co. ex rel. v. Kavenaugh (1935), 295 U. S. 56, 55 S. Ct. 555 (79 L. Ed. 1298);
Sauer v. New York (1907), 206 U. S. 536, 27 S. Ct. 686 (51 L. Ed. 1176);
Muhlker v. New York etc. R. Co. (1905), 197 U. S. 570, 25 S. Ct. 522 (49 L. ed. 872);
Dougless v. Pike County (1879), 101 U. S. 679-686 (25 L. ed. 968).

18.

A statute granting a franchise is more in the nature of a contract than a "law of the land" in the constitutional sense. Tipton County v. Rogers Locomotive & Mach. Works, 103 U. S. 523.

Franchises granted to private corporations are necessarily continuing contracts and upon acceptance become a contract within the protection of the contract clause. New York Electric Lines Co. v. Empire City Subway, 235 U. S. 179; Jefferson College v. Washington & Jefferson College, 23 Wall 190, 20 Law ed. 550; Ohio Public Service Co. v. State of Ohio ex rel. Fritz (1926), 274 U. S. 12, 14 (71 Law ed. 898, 901). Likewise, corporate charters: Long Island Water Co. v. Brookline, 166 U. S. 685, 41 Law ed. 1165; Stone v. Mississippi, 101 U. S. 814, 25 Law ed. 1079.

B.

## THE CONSTRUCTION OF THE STATE SUPREME COURT NOT CONCLUSIVE IN THIS COURT.

The Supreme Court of the United States is not bound by the construction given by the highest court of a state to a state statute, or to a contract executed pursuant to its terms, where the contract clause of the Federal Constitution is involved. This rule applies as to the existence and terms of the contract and the provisions of the statute itself. In all such cases this Court will exercise its independent judgment.

Phelps v. Board of Education of the Town of West New York, 57 S. Ct. 483;
Coombes v. Getz, 285 U. S. 434, 441, and cases there cited;
Appleby v. City of New York, 271 U. S. 364, 379, 380;
Tidal Oil Company v. Flanagan, 263 U. S. 444, 451.

C.

## CONTRACTS OF STATES AND THOSE EXECUTED PURSUANT TO STATUTES ARE WITHIN THE PROTECTION OF THE CONTRACT CLAUSE.

(1) It is indisputable that a contract may consist of the provisions of a statute, the acceptance of the terms of the statute and the judicial construction thereof prevailing at the time of such acceptance.

New Jersey v. Yard, 95 U. S. 110, 114;
Douglass v. Pike County, 101 U. S. 679, 686;
Worthen Co. ex rel. Board of Commissioners of Street Improvement District v. Kavanaugh, 295 U. S. 56, 60.

(2) The obligation of such a contract, even if a state is a party thereto, cannot be impaired under the contract clause.

Hall v. Wisconsin, 103 U. S. 5, 10, 11;
Yard v. New Jersey, 95 U. S. 110, 114;
Woodruff v. Trapnall, 10 How. 190, 196;
Long Island Supply Co. v. Brooklyn Trust & Guaranty Co., 166 U. S. 685, 690, 691, commenting on Hall v. Wisconsin;
Coombes v. Getz, 285 U. S. 434, 441, and cases there cited;
Carondelet Canal & Nav. Co. v. Louisiana (1914), 233 U. S. 362, 378.

(3) Notwithstanding any repeal that may have been effected by the Teachers' Tenure Amendatory Act of 1933 of the provisions of the Teachers' Tenure Act of 1927, through the elimination of township school corporations from the Amendatory Act, nevertheless, the contract of petitioner having been made under the authority of the Act of 1927, acquired an independent existence and would survive the destruction of the statutory provision which gave this contract birth.

Coombes v. Getz, 285 U. S. 434, 441.

There is no provision in the statutes or Constitution of Indiana as to the effect of a repealing statute similar to the California statute pointed out in the dissenting opinion of Mr. Justice Cardozo in Coombes v. Getz. On the contrary, a specific statute of Indiana, quoted in the foregoing statement of the case, expressly provides that vested rights are immune from the effect of repealing statutes.

D.

THE CONTRACT CLAUSE AND THE POLICE POWER.

(1) Police power can be exercised only within such limits as affords proper respect for the contract clause of the Constitution and may not be exercised in such manner as to abrogate the contract clause.

Treigle v. Acme Homestead Assoc. (1936), 297 U. S. 189, 196 (80 L. ed. 575-580);
W. B. Worthen v. Thomas, 292 U. S. 426, 431, 432;
Worthen Co. ex rel. Board of Commissioners et al. v. Kavanaugh, 295 U. S. 56, 60.

(2) The police power affords no excuse for disregarding private rights where the object of the Legislature can be achieved by regulation and prohibition is not required therefor.

Adams v. Tanner (....), 244 U. S. 590, 596;
Grand Trunk Western Railroad Co. v. South Bend (....), 227 U. S. 544, 555;
City of Owensboro v. Cumberland Telephone & Telegraph Co. (1913), 230 U. S. 27.

(3) The Indiana Teachers' Tenure Act of 1927 contains within sections 2 and 5 hereof ample provisions for maintaining the efficiency of teachers, conformity to the reasonable rules of the School Board and the necessities of school administration. The act provides for the termination of the continuing contract of the teacher for "incompetency," "insubordination" (which shall be deemed to mean willful refusal to obey the school laws of this state or reasonable rules prescribed for the government of the public schools of such corporation), "neglect of duty," "immorality," "justifiable decrease in the number

of teaching positions," or other "good and just cause," but may not be made for political or personal reasons. Section 5 authorizes enforced leave of absence because of physical or other disability. Under these clauses the Supreme Court of Indiana has held that the words "other good and just causes" includes "lack of co-operation" or any good cause which bears reasonable relation to the teacher's fitness or capacity to discharge his duties.

Stiver v. State ex rel. Kent (1936), 1 N. E. (2d) 1006, 1008.

Under the Massachusetts statutes it has been held that "other good cause" includes any grounds put forward in good faith which are not arbitrary, irrational, unreasonable or irrelevant to administering and maintaining an efficient school system.

Rinaldo v. Dreyer (1936), 1 N. E. (2d) 37.

(4) Under the doctrine of Grand Trunk Western Railroad Co. v. South Bend, supra, further provisions of a regulative as distinguished from an abrogative nature could be made by the Legislature if the provisions of the Act of 1927 were not sufficiently elastic to permit the dismissal of a teacher where the reasonable requirements of a public school system demanded such dismissal.

(5) Procuring a mere advantage to the state arising from the cancellation of existing contracts is not a legitimate exercise of the police power and does not justify the impairment of existing contracts. Nor does a change of mind on the part of the Legislature as to the balance of public convenience justify such impairment.

Grand Trunk Western Railroad Co. v. South Bend, 227 U. S. 544, 555.

There is no unrestricted authority under the police

power to accomplish whatever the public may presently desire.

Panhandle Eastern Pipe Line Co. v. State Highway Commissioners, 294 U. S. 613, 622.

Public franchises, held protected under the contract clause in cases cited above, afford no more justifiable occasion for protection than does the investment represented by a teacher in her contract and the education she has at stake therein.

"Industry, talent and integrity constitute a fund which is as confidently trusted as property itself." Chief Justice Marshall in Sturges v. Crownshield, 4 Wheat. 122, 128, quoted with approval in W. B. Worthen v. Thomas, 292 U. S. 426, 431, 432. The Amendatory Act of 1933 does not expressly declare any purpose to abrogate pre-existing contracts nor does it recite or intimate the existence of any public evil, mischief, sought to be remedied, and merely prescribes a rule for the formation of future contracts. Neither this amendatory statute nor the majority opinion of the court below reveal any evils in the pre-existing contracts or declare that the police power was exercised for such or any similar purpose. "Contracts may not under the police power be abrogated for no discernible public purpose." Treigle v. Acme Homestead Assoc., supra.

(6) There is no evil in contractual employment of teachers, because the state has continued the practice and has permitted the indefinite contract system to remain in city and town school corporations, under the Amendatory Act of 1933, which, however, in rural schools, now abolishes hearing and notice before dismissal and renews the permissibility of dismissals for personal and political reasons. The provisions thus abolished in the rural schools were to the public advantage and cannot possibly be deemed a public evil.

## V.

## ARGUMENT.

Two fundamental legal questions are involved in this case: Whether the petitioner's employment relationship with the respondent under the Teachers' Tenure Act of 1927 was a continuing contract in the true sense of the word, and whether, if it did constitute a continuing contract, it is protected by the contract clause of the Federal Constitution against impairment through the abrogative effect given by the court below in the majority opinion to the amendatory Teachers' Tenure State of 1933.

As to the first question it is difficult to escape from the plain language of the Act of 1927, Section 1. This section has prescribed as the qualification for a person to enter into such a continuing contract that he must have served under contract as a teacher in the school corporation for five years or more consecutive years, and then further requires such persons to "enter into a teacher's contract for further service with such corporation." If this qualification exists and the contract for "further service" is entered into, the act provides: "Upon the expiration of any contract between such school corporation and a permanent teacher, such contract shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract. Such an indefinite contract shall remain in force unless succeeded by a new contract signed by both parties or unless it shall be canceled as provided," etc. That the Legislature was employing a contractual relationship as the very means of accomplishing the purpose of the act seems abundantly clear from the language just quoted, from the title of the Teachers' Tenure Act of 1927 (Appendix C), from the title of the Indiana Act of 1921 (Appendix B) to which it is de-

clared specifically in Section 6 of the Act of 1927 to be "supplementary," from the redundant use of the word "contract" throughout the act, from the provisions of the Act of 1899, page 173, which declares "that all contracts hereafter made by and between teachers and school corporations shall be in writing signed by the parties to be charged thereby," from the traditional contractual relationship prevailing for many years in Indiana, as well as from the mandatory construction required by Section 1-201, Clause 1, Burns' Ind. Stat. Ann. 1933, that "words and phrases shall be taken in their plain or ordinary sense."

The Legislature, with a choice of methods which the experience of teachers' tenure systems placed at its disposal, such as a merely civil service status resting on a legislative direction to officers and stopping short of contractual relationhip, permissive collective bargaining, or the contractual method, deliberately preferred achieving the security of the teacher through the medium of a continuing contract inviolable for merely nonprofessional, personal or political reasons.

In Dodge v. Board of Education, supra (Nov. 8, 1937), Vol. 82, 3 Adv. Op. L. Ed. 77, 79, this Court, speaking through Mr. Justice Roberts, remarks:

> "In determining whether a law tenders a contract to a citizen it is of first importance to examine the language of the statute. If it provides for the execution of a written contract on behalf of the state the case for an obligation binding upon the state is clear."

It is sufficiently alleged in petitioner's complaint below that she had entered into the necessary written contracts. Brumfield v. State ex rel. Wallace (1934, 206 Ind. 647), 190 N. E. 863-867.

She had also performed them prior to the school year 1931-1932. The last requisite of the statute had been complied with, the contemplated consequence of an effective continuing contract had attached and [illegible] performance of its obligation entered upon long [illegible] the threatened repudiation by the respondent.

Moreover, appellant's last written contract was for the school year 1932 to 1933, and under the usual administrative practice of school corporations in Indiana, such contracts are not executed until after the conclusion of the previous school year prior, therefore, to the execution of the last written contract of the petitioner. The Supreme Court of Indiana, on March 29, 1932, in School City Elwood et al. v. State ex rel. Griffin, 203 Ind. 626, said:

> "The position of a teacher in the public schools is not a public office, but an employment by contract between the teacher and the school corporation. The relation remains contractual after the teacher has, under the provisions of a Teachers' Tenure Law, become a permanent teacher—but the terms and conditions of the contract are thereafter governed primarily by the statute."

Under an undeniable rule of law this construction of the statute made immediately prior to the petitioner's contract became an integral part of it. This contract of petitioner expressly referred to the Act of 1927 and expressly made the same a part thereof.

Cases cited under IV, 3-4, Summary of Argument above, represent but a few selections from the many precedents denying that there is any room for construction on an act that is plain and unambiguous. It will be observed that the mere fact that a teacher has taught under contract for five consecutive years in a school corporation does not operate to put the continuing contract into effect. It

requires both the consensual act of the parties in a contract "for further service" in the school corporation and the report required under section 3 of the act to be made by the school superintendent upon the teacher's preparation, experience and license. When the parties enter into a contract "for further service" by the teacher after five consecutive years of service, it is clearly in the contemplation of the parties that upon the expiration of such contract the statutory provisions will apply and convert the teacher's contract "for further service" into the indefinite contract described in Section 1 of the Act of 1927, which can be terminated only as therein provided. Initiation of a teacher's "indefinite contract" is, therefore, essentially consensual.

The contractual background of the Teachers' Tenure Act of 1927, its reiterative use of the terminology of contract and the employment of a written contract as an instrumentality for effecting the legislative purpose easily distinguishes this case from Phelps v. Board of Education of West New York, supra, and the New Jersey statute there held not to create a contract. Similar features were plainly lacking, both in the New Jersey tenure statute there considered and in the educational tradition and practice of that state.

In the light of the paramount rule of construction which requires that the path must be made smooth for the accomplishment of the legislative purpose, a construction alternative to one which recognizes that the contract described in the Act of 1927 is a continuing contract, is untenable. A construction of the act which treats the obligation of the school township as merely a contract from year to year not only ignores the purpose of the act, but defeats it. Such a construction restores the very evil which the act sought to remedy, namely, the insecurity of the teacher in

her professional employment and the permissibility of discharge for nonprofessional, personal and political reasons.

The majority opinion upon rehearing does not altogether deny to the petitioner's employment relationship the quality of a contract, but insists that the contract is not a continuing one beyond the current year The Court reasons that while the Act of 1927 was unamended or repealed by the amendatory Act of 1933, the operation of the contract through the years rested entirely upon the official duty imposed by the local school officers by the Act, and this official duty being removed by the enactment of the Act of 1933, as to the employment of teachers in township schools, the contractual relationship thereupon ceased.

This view offends against the language of the Act, in that the Act attaches the quality of survival from year to year to the contract rather than to any official duty. The contract is purely consensual in its origin and such compulsion as the Act exercises upon the officers of the school corporation is entirely incidental to the recognition of the continuing contract and the contract is not incidental to an official duty. The Court's view seems to fail to recognize that the purpose of the Legislature in the enactment was not to establish a civil service system, but to place the security of the teacher on a firmer foundation, quite beyond the power of the State to disturb except to the extent that regulative changes might be required from time to time. This foundation was grounded upon the contractual obligation of the State itself created through the act of its agencies, the several school corporations.

Notwithstanding the explicit provisions of the statute that the "contract shall remain in force until canceled" in the method provided in the Act, the court below insists that this plain language lacks efficacy because of want of

mutuality. This asserted want of mutuality is predicated upon the provisions of the Act that during the period between the expiration of one school year and a date thirty days before the beginning of the next school year, the teacher, under the terms of the statutory contract, has the privilege of terminating her employment thereunder by giving to the school corporation a five days written notice. Although the Act accords to the school corporation also a privilege of cancellation after notice and hearing, it is claimed that the privilege accorded to the teacher is unilateral and results in want of consideration.

Prior to the rendition of the decision in Anderson ex rel. v. Brand the Supreme Court of Indiana had carefully considered this proposition and had announced what seems to us the sounder doctrine. In Kostanzer et al. v. State ex rel. Ramsey (1933), 105 Ind. 536, 548, 549, the Court declared:

> "But there is nothing in the law of contracts to prevent one party to a contract granting to the other the privilege of rescission or cancellation on terms not reserved to the former party. The local school corporations are agents of the state, * * * and the General Assembly has power to prescribe the terms of the contract to be executed by these agents."

Putting aside for the moment what the true rule of the common law as to the point in question may be, the Kostanzer case suggests that it is for the sovereign state, speaking through the Legislature, to determine for itself in its own contracts what is a sufficient consideration moving to the State from its promisee, when it should be received, and of what it should consist notwithstanding any rule of common law to the contrary. It is the common

law and not the statute that must give way to achieve the legislative purpose.

Connell v. State ex rel. Thompson (1925), 196 Ind. 421;

Burns' Ind. Stat. Ann. 1933, Section 1-101, declaring what is the law of the state and authorities cited under Summary of Argument IV-(8).

Laying aside for a moment the necessary effect of the statute itself in disposing of the objection of lack of mutuality, the position of the court below as to the common-law rule in question is unsound and the case relied upon, Davis v. Davis, director General, supra, is not in point. In the Davis case the contract in controversy is merely a general promise of employment on each side without any certain terms whatsoever as to compensation or other elements. There was no requirement in that contract for the rendition of service for a stated period before a contract should go into force carrying a limited cancellation privilege to each party thereto, to be exercised in a certain manner and varied to suit the differing needs of the contracting party, as is provided in the statutory tenure contract. However, there was at the time of the execution of petitioner's contract a decision of long standing in Indiana rendered in 1906, which recognized a unilateral privilege of cancellation exercisable after performance is begun,

Over v. Byram Foundry Co. (1906), 37 Ind. App. 452, 455,

which, so far as the rule of common law was then declared in Indiana, entered into and constituted a part of petitioner's contract. Without entering into a discussion of the doctrine of consideration as to which the so-called want of mutuality exclusively pertains, the common law recognizes as sufficient consideration either a benefit to the promisee or a detriment to the promisor.

Statutes and contracts should, of course, be construed to be effective rather than nugatory. One reasonable view of the statute of the Act of 1927 would regard the performance of the contract of further service which must occur prior to such contract being converted into a continuing contract as adequate consideration therefor. In other words, the performance of the contract for further service would place the statutory contract within the category of the many cases holding that either an option contract or an employment contract for an indefinite period is valid if a prior consideration has been received. The statute may also be viewed as establishing a stated period of performance under the initial contract for "further service" as preliminary to the effectiveness of the teacher's indefinite contract and thus place this case within the category of precedents holding that, where performance is certain for a fixed period, a unilateral privilege of cancellation subsequently accruing does not cause want of mutuality. Either of these views of the statute places the contract within the authorities cited under summary of argument, IV, 10, supra. The present case is analogous to Pilkington v. Scott (1846), Eng. Exchequer 15 M. & W. 655, rather than to Davis v. Davis, Director, relied on by the court below. In the Pilkington case a contract containing specific provisions also provided that the employe could be dismissed from service on a month's notice and payment of a month's wages. Against the contention that the contract was unilateral and lacked mutuality, it was distinctly held that, since the contract remained in operation and its continuance could be avoided only by one of the parties discharging the burden of giving a written notice and paying wages, there was sufficient consideration.

In Philadelphia Ball Club v. Lajoie, 202 Pa. 210, the

contract was unilaterally cancellable on notice and it was held that this constituted sufficient consideration.

In Farmers' Handy Wagon Co. v. Newcomb, 192 Mich. 634, the Court passed on a contract containing the provision that the buyer had until a certain date to reconsider the buying. The buyer failed to give any notice of any reconsideration. Notwithstanding this limited right of rendering his contract ineffective before the time of performance had arrived, the Court held:

> "The order with acceptance by plaintiff became a contract subject to a right on the part of defendant to withdraw within the time stated."

The first illustration cited in The Restatement of the Law, page 89, reads—attention being called to the last sentence—as follows:

> "A promises B to act as B's agent for three years on certain terms, and B agrees that A may so act, but reserves the power to cancel the agreement at any time. B's agreement is insufficient consideration, since it involves nothing that can properly be called a promise. Otherwise, if B reserves the power to cancel on 30 days notice."

In Merchants Life Ins. Co. v. Griswold (Tex. Court of Civil Appeals) (1919), 212 S. W. 807, cancellation privileges of differing character were accorded to each party upon written notice. The Court upheld the contract against a claim of want of mutuality.

In Gurfein v. Werbelovsky (1922), 97 Conn. 703, the Court held that an order for a specific amount of plate glass at a specific price and containing adequate shipping instructions was not without consideration, because the

order contained "the option to cancel the above order before shipment." A very full discussion of the legal sufficiency of the consideration appears at pages 706, 707 of the official report. One observation of the Court is worthy of repetition here:

> "In this connection it is important that the contract is framed on the theory that it remains enforceable by either party unless and until the plaintiff brings home notice of cancellation before shipment."

It abundantly appears in the authorities cited under IV, 10, supra, that the circumstance that the contract is formally binding, and requires as an obligation thereof that a party is required to do a specific thing such as the giving of written notice within a limited time in order to terminate the obligation, is considered a legal consideration, whether regarded as a detriment to the promisor or a benefit to the promisee. This doctrine of consideration aptly fits the provisions of the continuing contract under the Act of 1927.

Attention is also called to the scholarly discussions in the Articles cited in IV, 10, above. These Articles review the history and the theory of consideration at common law. See, also, Williston on Contracts, Rev. Ed. 1936, pages 365, 366.

The refinements of the doctrine of consideration seem an airy nothing wherewith to thwart a laudable legislative purpose. Theories more intangible than scholastic distinctions should not avail to stay the sovereign will expressed in a statute. The construction resulting is unjust and inequitable. To thousands of teachers the sovereign state has said, "Here is a contract, which 'shall remain in force until canceled' as provided by statute. Forego other employment, educate our children. Take the security this

contract specifically promises you." And now to the thousands of teachers who accepted the written word of the state, it is announced: "The language of the state's contract did not mean what it said. A rule of common law prevails over the statute you relied upon. You never had a contract binding beyond a year. You may have been misled. That is your misfortune." Such a result inevitably implied in the construction prevailing below entails the dishonor of the state and imperils the social value of the security of contracts.

The observation of this Court in Hall v. Wisconsin is especially pertinent:

> "It is not to be supposed that the plaintiff in error would have turned his back upon like employment, actual or potential, elsewhere, and have stipulated as he did to serve the State of Wisconsin for the period named, if the idea had been presented to his mind that the State had the reserved power to break the relation between them whenever it might choose to do so. Nor is there anything tending to show that those who acted in behalf of the State had any such view at that time. All the facts disclosed point to the opposite conclusion as to both parties."

Faith should not thus be publicly broken with those whose patriotic duty it is to instill into the hearts and minds of our children unwavering faith in the sovereign state.

No infirmity vitiating petitioner's tenure contract can be predicated upon the permissive feature of the statute to the effect that, if so stated in the contract, wages in ensuing years may be determined by a schedule adopted by the school corporation. This does not permit an arbitrary determination of the teacher's salary so as to render the obligations of the school corporation illusory. Hut-

ton v. Gill, 8 N. E. (2d) 818 (Ind. Sup. Ct. 1937), holds that such a schedule must be based upon reasonable classification and cannot be arbitrarily fixed.

This eliminates the element of uncertainty as to compensation.

The contractual nature of the employment relationship is not disparaged by the use of the word "indefinite" in characterizing the contract in the act. This has reference clearly to its contingent duration, since at the time of its making, the occurrence of the events, which will justify cancellation by the school corporation, cannot be prophesied, such a contract is analogous to the franchise or permit of a public service corporation which is often termed "indeterminate."

Too well acknowledged to warrant discussion is the principle upon which this Court has proceeded in many recent cases: That it is not bound by the construction given by a State Supreme Court to a statute or contract in any case where the contract clause of the Federal Constitution is involved. No matter whether the subject matter of the discussion is a statute or a contract or a composite of both, this Court will exercise its independent judgment in determining the meaning, existence and terms of both. (See cases cited, Summary of Argument, B.) For the same reason, no elaboration is required as to the accepted doctrine that a contract within the meaning of the contract clause may consist of the provisions of a state statute, the acceptance of the terms of the statute and the judicial construction thereof prevailing at the time of such acceptance, or it may consist of a contract executed in pursuance of the statute and that this doctrine applies to contracts to which a state is a party as well as to contracts between private parties. (See cases cited under Summary of Argument, IV-C, 1 and 2, supra.)

In considering the effect of the amendatory Teachers' Tenure Act of 1933, and the respondent's action under the assumed authority of that act upon the petitioner's contract under the Acts of 1927, the holding of this Court in Coombes v. Getz, supra, seems controlling:

> "His (petitioner's) cause of action was not purely statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future, but did not and could not destroy or impair the previously vested right of the creditor which in every sense was a property right."

Similarly petitioner's continuing contract as a permanent teacher under the Act of 1927 survived, as an independent entity, the statute which authorized its inception.

The ground upon which dissent arose in the decision in Coombes v. Getz, namely, a statute of the State of California, expressly providing against the saving of existing rights from the effect of statutory repeal, is not present in the instant case, because of a directly opposite provision in the statutes of Indiana. This provision of the Indiana statute specifically saves rights which have become vested prior to repeal, where the repealing act does not otherwise provide. It reads:

> "No rights vested, or suits instituted under existing laws, shall be affected by repeal thereof, but all such rights may be asserted and such suits prosecuted as if such laws had not been repealed." (Burns' Ind. Stat. Ann. 1933, Section 1-302.)

The amendatory Act of 1933 enacts nothing to the contrary.

Let us now consider the relation of the police power to the obligation of petitioner's contract under Article I, Section 10, of the Federal Constitution, protecting that contract. It should be observed that the court below did not in terms invoke the police power as a ground of its holding. The opinion, however, did refer, in its first opinion (R. 13), to the power of the state in the establishment and maintenance of public schools. This is repeated in the second majority opinion (R. 21). The majority opinion of the Court likewise declared that one Legislature cannot be bound by the action of another in relation to public welfare.

Of course, there is no specific provision in the Constitution of Indiana restricting the power of the state to incur contractual obligations in administering school affairs.

We have taken these general expressions of the court below as suggesting, at least, that the obligation of petitioner's contract was constitutionally impaired through the exercise of the police power.

The court below nowhere described or referred to any evil which the Legislature sought to remedy by the enactment of the amendatory Act of 1933. Neither the statute nor the opinion of the court below discloses any emergency or occasion for its enactment. The nearest approach thereto is found in the language of the Court (R. 14), "a future General Assembly may favor a policy of constant change of teachers. The courts are powerless to prevent such a change. Each succeeding Legislature is free and untrammeled in its right to change governmental policy."

This language of the court below may be contrasted with the language of the Supreme Court of the United

States in Panhandle Eastern Pipe Line Co. v. State Highway Commissioners, 294 U. S. 613, 622, where it is said:

> "The police power of a state, while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations. It springs from the obligation of the state to protect its citizens and provide for the safety and good order of society. Under it there is no unrestricted authority to accomplish whatever the public may presently desire."

The language of the court below in the same opinion, in speaking of the Act of 1927, "but its enactment can be justified upon the theory that its purpose is to promote the good order and welfare of the State and of the school system by preventing the removal of capable and experienced teachers at the political or personal whim of changing office holders."

It now appears that, while no discernible public purpose is disclosed in the Court's opinion as a justification for the enactment of the amendatory Act of 1933, this very opinion announces the laudable purpose accomplished in the enactment of the Act of 1927.

Some recent statements of the Supreme Court of the United States become very applicable to the instant case.

In Treigle v. Acme Homestead Assoc. (1936), 297 U. S. 189, 196 (80 L. ed. 575, 580), Mr. Justice Roberts, speaking for the Court, said:

> "Such an interference with the right of contract cannot be justified by saying that in the public interest the operations of building associations may be controlled and regulated, or that in the same interest their charters may be amended. The statute merely attempts, for no discernible public purpose, the abro-

> gation of contracts between members and the association lawful when made. This cannot be done under the guise of amending the charter powers of the corporation. Compare Bedford v. Eastern Bldg. & L. Asso., 181 U. S. 227, 45 L. ed. 834, 21 S. Ct. 597."

And again, in the same case:

> "Though the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised for an end which is in fact public, and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive."

In Worthen & Co. v. Kavanaugh, 295 U. S. 56, 60 (1934), 79 L. Ed. 1298-1301, the Court said at page 640:

> "Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bounds must be respected."

In W. B. Worthen v. Thomas, 292 U. S. 426, 431, 432 (1933), 78 L. Ed. 1344-1346-1347, a statute exempting the proceeds of life insurance companies from the payment of debts was under consideration, and Mr. Chief Justice Hughes, speaking for the Court, said:

> "Such an exemption, applied in the case of debts owing before the exemption was created by the legislature, constitutes an unwarrantable interference with the obligation of contracts in violation of the constitutional provision. Gunn v. Barry, 15 Wall. 610, 622, 623, 21 L. Ed. 212, 214, 215; Edwards v. Kearzey, 96 U. S. 595, 604, 24 L. Ed. 793, 797; Bank of Minden v. Clement, 256 U. S. 126. Justice Marshall, in Sturges v. Crownshield, 4 Wheat. 122, 198, 4 L. Ed. 529, 549, ob-

served that 'it is not true that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents, and integrity, constitute a fund which is as confidently trusted as property itself. Future acquisitions are, therefore, liable for contracts; and to release them from this liability impairs their obligation.' This principle was applied to an exemption of insurance moneys, in relation to antecedent debts, in Bank of Minden v. Clement, 256 U. S. 126, 65 L. Ed. 857, 41 S. Ct. 408, supra,"

and again, after referring to Home Bldg. & L. Asso. v. Blaisdell, 290 U. S., page 433, the Court said:

"But we also held that this essential reserved power of the state must be construed in harmony with the fair intent of the constitutional limitation, and that this principle precluded a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. We held that when the exercise of the reserved power of the State in order to meet public need because of a pressing public disaster, relates to the enforcement of existing contracts, that action must be limited by reasonable conditions appropriate to the emergency. This is but the application of the familiar principle that the relief afforded must have reasonable relation to the legitimate end to which the State is entitled to direct its legislation. Accordingly, in the Blaisdell Case, we sustained the Minnesota mortgage moratorium law in the light of the temporary and conditional relief which the legislation granted. We found that relief to be reasonable, from the standpoint of both mortgagor and mortgagee, and to be limited to the exigency to which the legislation was addressed."

In the light of these cases the majority opinions of the

court below reveal no justification for the destruction of petitioner's contract under the guise of an exercise of the police power.

The problem of reconciling the police power, on the one hand, with the protection undoubtedly intended by the Constitution for the obligation of contracts against impairment through the enactment of a state law is trenchantly touched upon in the quotation made above from the opinion of this Court in Treigle v. Acme Homestead Assoc. The problem is likewise well formulated in Panhandle Eastern Pipe Line Co. v. State Highway Comm., 294 U. S. 613, 621 (1935) (79 L. Ed. 1090, 1096), where Mr. Justice McReynolds, speaking for the court, quotes with approval an opinion of the late Justice Holmes, who, as a rule, was in advance in sustaining the exercise of the police power of the several states, as follows:

> "As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most, if not in all cases, there must be an exercise of eminent domain and compensation to sustain the act,"

and again, in the same case, Mr. Justice McReynolds, speaking for the majority of the court, said:

> "The police power of a state, while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations. It springs from the obligation of the state to protect its citizens and provide for the safety and good order of society. Under it there is no unrestricted authority to accomplish whatever the public may presently desire."

At this point we wish to call the attention of the Court to Hall v. Wisconsin, 103 U. S. 5.

The case of Hall v. Wisconsin, where an engineer's contract was held to be protected against abrogation by the contract clause of the Federal Constitution, is the subject of an illuminating discussion in Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 690 (1896), 41 L. Ed. 1165, 1167:

> "Its condemnation is, of course, subject to the rule of just compensation, and that is all that is implied in the decision such as Hall v. Wisconsin, 103 U. S. 5 (26:302), cited by counsel. In that case it appeared that Hall had a contract with the state for service entered into in pursuance of a statute, that he performed the services, but that before finishing his work the Legislature repealed the statute authorizing the contract. It was held that he was nevertheless entitled to his stipulatel compensation. The act of the Legislature in the repeal was not one providing for condemnation, and in so far as it partook of the nature of a condemnation it ignored the obligation of just compensation and was therefore void; but it was not held that, if just compensation had been provided and a public use required, the contract might not have been condemned."

As contributing to the solution of the relative influence of the police power and the contract clause upon issues in this case, as well as affording a striking example of the erroneous interpretation of the police power in cases where the contract clause of the Federal Constitution is involved, we call attention to an Indiana decision reversed by the Supreme Court of the United States. We shall refer first to the Indiana decision and later to the United States Supreme Court decision.

In Grand Trunk W. R. Co. v. South Bend, 174 Ind. 203 (89 N. E. 885, at 887), the Indiana Supreme Court declared:

Indiana decision overruled by U. S. Supreme Court.

"The Legislature, primarily, has control over streets, as well as of other public highways; they are arteries of the State. State ex rel. v. Board, 170 Ind. 595, 609, 85 N. E. 513; Cones v. Board, 137 Ind. 404, 37 N. E. 272. And this governmental power of control cannot be surrendered or contracted away. It is a part of the police power, which cannot be alienated or placed beyond municipal control" (citing cases).

And again the Indiana Supreme Court, at page 889, said:

Indiana decision overruled by U. S. Supreme Court.

"All parties dealing with a sovereign power, or any of its functionaries in the exercise of governmental power, the subject of which pertains to government, do so knowing that it cannot contract away the power conferred for self-protection or self-preservation. The rule, therefore, that the Legislature can pass no law impairing the obligation of contracts does not apply to parties dealing with a department of government concerning the future exercise of powers conferred for public purposes by legislative acts, where the subject matter of the contract is one which affects the safety and welfare of the public" (citing cases).

In accordance with these principles the Supreme Court of Indiana then held that the city ordinance in question was valid.

It may here be noted that the Supreme Court asserted the same plenary power of the state over its highways which this Honorable Court has asserted with reference to the public schools.

However, the Supreme Court of the United States reversed the decision of the Supreme Court of Indiana in the

Grand Trunk W. R. Co. v. South Bend, 227 U. S. 544 (57 Law. Ed. 633), and in rendering its decision Mr. Justice Lamar, speaking for the Court, said (pp. 553-554, Official Report):

> "These, however, are examples of the persistence of the power to regulate, and do not sustain the validity of the repealing ordinance of 1901, since it is not regulative of the use, but destructive of the franchise. In every case like this, involving an inquiry as to whether a law is valid, as an exertion of the police power, or void, as impairing the obligation of a contract, the determination must depend on the nature of the contract and the right of government to make it. The difference between the two classes of cases is that which results from the want of authority to barter away the police power, whose continued existence is essential to the well-being of society, and the undoubted right of government to contract as to some matters, and the want of power, when such contract is made, to destroy or impair its obligation. New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co., 115 U. S. 650, 29 L. Ed. 516, 6 Sup. Ct. Rep. 252."

Again, at pages 554 and 555, the Court said:

> "The state, with its plenary control over the streets, had this governmental power to make the grant. There was nothing contrary to public policy in any of its terms, and, being valid and innocuous, the police power could not be invoked to abrogate it as a whole or to impair it in part. Walla Walla v. Walla Walla Water Co., 172 U. S. 17, 45 L. Ed. 348, 19 Sup. Ct. Rep. 77. Tracks laid in a street, under legislative authority, become legalized, and when used in the customary manner cannot be treated as unlawful, either in maintenance or operation. As said by this Court: 'A railway over * * * the streets of the City of Washington may be authorized by Congress, and if,

when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded.' Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 331, 27 L. Ed. 739, 744, 2 Sup. Ct. Rep. 719. The inconvenience consequent upon the running of a railroad through a city, under state authority, is not a nuisance in law, but is insuperably connected with the exercise of the franchise granted by the state. If the police power could lay hold of such inconveniences, and make them the basis of the right to repeal such an ordinance, the contract could be abrogated because of the very growth in population and business the railroad was intended to secure.

"The power to regulate implies the existence and not the destruction, of the thing to be controlled. And while the city retained the power to regulate the streets and the use of the franchise, it could neither destroy the public use nor impair the private contract, which, as it contemplated permanent, and not temporary, structures, granted a permanent and not a revocable franchise. Both the street and the railroad were arteries of commerce. Both were highways of public utility, and both were laid out subject to the authority of the state, though the power to regulate the use of the streets has been delegated to the municipality. So that, while the company was itself authorized to select the route between the terminal points named in the charter, it could not use streets without the consent of the city through which the line ran. In determining whether they would grant or refuse that consent the municipal authorities were obliged to balance the present and prospective inconveniences of having trains operated through its streets against the advantage of having the railroad accessible to its citizens. It could have refused its consent,

except on terms; it could have forced the road to the outskirts of the town, or could have permitted the company to lay tracks in the more thickly settled parts of the city. When such consent was once given, the condition precedent had been performed, and the street franchise was thereafter held, not from the city, but from the state, which, however, did not confer upon the municipality any authority to withdraw that consent, nor was there any attempt by the council to reserve such power in the ordinance itself."

And, again, at page 556:

"If South Bend can do so, every other municipality having granted like rights, under similar ordinances, and affecting every line of railway in the country, can repeal the franchise to use double or single track. On the ground of congestion of traffic, the state's grant and command to operate a continuous road could be nullified by municipal action, to the destruction of great highways of commerce, similar in their nature to the street itself. Such consequences, though improbable, are rendered impossible by the provision of the Constitution of the United States prohibiting the impairment of the obligation of a contract by legislation of a state, whether acting through a general assembly or a municipality exercising delegated legislative power."

And, again, at page 557:

"Obviously, upon the clearest considerations of law and justice, the grant of arthority to defendant, when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside. St. Louis v. Western U. Teleg. Co., 148 U. S. 103, 37 L. Ed. 385, 13 Sup. Ct. Rep. 485."

And, again, at page 558:

"As said in Indianapolis v. Indianapolis Gaslight

> & Coke Co., 66 Ind. 402, such a contract ordinance does not in the least restrict 'the legislative powers of the city, except that, as the sanctity of the contract is shielded by the Constitution of the United States, it cannot, in the exercise of its legislative power, impair its validity; for it would be a solecism to hold that a municipal corporation can impair the validity of a contract, when the state which created the corporation, by its most solemn acts, has no such power.''

Grand Trunk Western Ry. Co. v. South Bend is followed and approved in Owensboro v. Cumberland T. & T. Co. (1912), 230 U. S. 72, 73.

Grand Trunk Railway v. South Bend provides the requisite line of demarcation between the police power and the contract clause, and seems particularly applicable to the citation at hand. It justifies the regulation of the rights of those enjoying public contracts, but it does not justify the striking down of the contract proper simply because the Legislature may conclude that public convenience will at the present time be better accommodated thereby, although the public convenience was better served by the contractual provisions at the time of their making. This seems to be subversive of the only reason advanced in the lower court to uphold the abrogation of petitioner's contract.

It will be noted that the power involved under the Grand Trunk Railway v. South Bend case related to the control of public highways, as to which the State enjoys as large a control as over its schools.

The provisions of the Act of 1927 permit the local school authorities to cancel the contract of a permanent teacher for reasons appertaining to the fitness of the teacher. The specific enumeration of causes for the removal of the teacher does not exhaust the category of reasons therefor,

because in section 2 it is specifically provided that a contract may be canceled for "other good or just cause." As noted in Summary of Argument, V, D, (3) and (4), this clause has been construed liberally in promoting the welfare of the schools. School boards have the power to enact reasonable rules and regulations. The willful violation of these rules and regulations is classified as "insubordination" under section 2 of the act and justifies the cancellation of the contract. Therefore, it seems that the Act of 1927 contains, under the judicial construction accorded to it, adequate means for the preservation of the public interest and a method for terminating the contract where after hearing and notice public interest requires. Should the statute still require amendment in the public interest so as to provide more ample and facile methods of regulating the contract and the conduct of the teacher thereunder, the doctrine of the Grand Trunk Railway Co. case justifies such enactments where regulative but not where destructive of the primary contractual obligation.

It is thus seen that if further educational qualifications, travel, new contacts, periods of study or research, should be required of the teacher a simple means through regulation is available to accomplish such purpose without disturbing the contractual relationship proper. Section 4 of the act already accomplishes this with reference to sickness or physical disability through enforced leave of absence.

This view is further confirmed by the holding in Adams v. Tanner, supra, where this Court held a law of the State of Washington invalid which entirely prohibited private employment agencies, largely on the ground that whatever acknowledged evil inhered therein could be remedied by regulation and the prohibition of the business proper was

unreasonable and, therefore, an unjustifiable exercise of the police power.

While it may be observed that in the Grand Trunk Case the rights involved were represented by physical property as well as by the incorporeal franchise, nevertheless it is not proper to say that the rights of persons in the petitioner's class are less valuable or less sacred under the sanction of the contract clause than are investments of wealth. We call attention to the observation of Mr. Justice Marshall in Sturges v. Crownshield, 4 Wheat. 122, 128, quoted by Chief Justice Hughes in W. B. Worthen v. Thomas, 292 U. S. 426, 431, 432:

> "* * * it is not true that parties have in view only the property in possession, or that its obligation does not extend to future acquisitions. Industry, talents and integrity constitute a fund which is as confidently trusted as property itself. Future acquisitions are therefore liable for contracts; and to release them from this liability impairs their obligation."

However, it is not alone the pecuniary interest of the teacher which is involved here. Through her contractual rights school children are being protected against their teachers being reduced to a "tramp profession" and against interference with their own proper development, through being placed under inexperienced teachers who have succeeded to the position of permanent teachers removed for personal or political reasons. The State chose the instrumentality of a continuing contract in the furtherance of the educational development of children. It cannot without imperiling vaster interests discard the contract as a worthless object without compensation to

those who, relying on the plighted word of the State, have sacrificed other valuable opportunities of employment.

Behind the formal legal issues in this cause great matters are at stake. A noble profession, comprising one million members, who have unselfishly devoted themselves to the instruction of the children of the nation, and, above all, these children also are gravely interested in the outcome. Where there was one Dartmouth College to which, as an alma mater, the great Webster might tearfully turn, there are thousands of public schools which are the only alma mater that the average child knows.

The Indiana Teachers' Tenure Act represents that species of the tenure system which was designed with a contractual base. The merely civil service type of statute, such as the New Jersey statute, does not avail against a change of mind on the part of the State. But collective bargaining and the contractual tenure system remain as alternatives.

If these fail, the profession has no secure protection against the State's own change of mind or against the vexations of politics.

Since January 1, 1937, ten states have passed new tenure laws of varying importance. Of these ten laws three may be placed as continuing contract statutes. This recent legislation is classified and copied in full in "Teacher Tenure Legislation in 1937 to Date," a pamphlet published by Committee on Tenure, National Education Association of the United States, October 1, 1937. Particular attention is called to Act No. 52, of the State of Pennsylvania, approved April 6, 1937, which seems to reveal a contractual tenure system closely related to the Indiana Act here being considered; also to the statute of Wis-

consin held protected against impairment in State ex rel. Nyberg v. Board, 190 Wis. 570.

Respectfully submitted,

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## APPENDIX A.

Chapter III, Section 1 and Section 2, page 173, of the Acts of the General Assembly of Indiana of 1899, Burns' Ind. Stat. Ann. 1933, Section 28-4302 and Section 28-4303.

An Act to Provide for Written Contracts Between Teachers and School Corporations.

Section 1. All contracts hereafter made by and between teachers and school corporations of the State of Indiana shall be in writing, signed by the parties to be charged thereby, and no action shall be brought upon any contract not made in conformity to the provisions of this act.

Section 2. For the purpose of carrying this act into effect, the school trustees of the several school corporations of this state shall provide a public record of uniform blank contracts to be carefully worded under the direction of the superintendent of public instruction, and cause such contracts to be signed therein, which record shall be deemed a public record open to inspection by the people of their several school corporations.

## APPENDIX B.

### Teachers' Contracts Required to Be in Writing.

Chapter 91, Sec. 1, p. 195, of the Acts of General Assembly of Indiana 1921, Burns' Indiana Stat. Ann. 1933, Sec. 28-4304.

An Act Concerning Teachers' Contracts and Providing for the Repeal of Conflicting Laws.

(S. 143. Approved March 7, 1921.)

Section 1. Be it enacted by the general assembly of the State of Indiana, That all contracts hereafter made by and between teachers and school corporations shall be in writing; shall state the date of the beginning of the school term; the number of months in the school term; the total amount of the salary to be paid during the school year; and the number of payments that shall be made during the school year; provided that in this act, a month shall mean not more than twenty school days.

## APPENDIX C

Indiana Teachers' Tenure Act 1927—Indiana Acts 1927, Page 259.

An Act defining teachers and permanent teachers, providing for their employment and release, and defining, and providing for the making and cancelling of, indefinite contracts.

(Approved March 8, 1927.)

Section 1. Be it enacted by the general assembly of the State of Indiana, That any person who has served or who shall serve under contract as a teacher in any school corporation in the State of Indiana for five or more successive years, and who shall hereafter enter into a teacher's contract for further service with such corporation, shall thereupon become a permanent teacher of such school corporation. The term "teacher" as used in this section shall mean and include licensed public school teachers, supervisors and principals of all public school corporations, and licensed assistant superintendents and superintendents of school cities and towns. Upon the expiration of any contract between such school corporation and a permanent teacher, such contract shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract. Such an indefinite contract shall remain in force unless succeeded by a new contract signed by both parties or unless it shall be cancelled as provided in section 2 of this act: Provided, That teachers' contracts shall provide for the annual determination of the date of the beginning and length of school terms by the school corporation: and, Provided, further, That teachers' contracts may contain provisions for the

fixing of the amount of annual compensation from year to year by a salary schedule adopted by the school corporation and such schedule shall be deemed to be a part of such contract; and, Provided, further, That such schedule may be changed by such school corporation on or before May 1st of any year, such changes to become effective at the beginning of the following school year: Provided, That all teachers affected by such changes shall be furnished with printed copies of such changed schedule within thirty days after its adoption.

Section 2. Any indefinite contract with a permanent teacher as defined in section 1 of this act may be cancelled only in the following manner: Not less than thirty days nor more than forty days before the consideration by any school corporation of the cancellation of any such contract, such teacher shall be notified in writing of the exact date, time when and place where such consideration is to take place; and such teacher shall be furnished a written statement of the reasons for such consideration, within five days after any written request for such statement; and such teacher shall, upon written request for a hearing, filed within fifteen days after the receipt by said teacher of notice of date, time and place of such consideration, be given such a hearing before the school board, in the case of cities and towns, and before the township trustee, in the case of townships; such hearing shall be held not less than five days after such request is filed and such teacher shall be given not less than five days notice of the time and place of such hearing. Such teacher, at the hearing, shall have a right to a full statement of the reasons for the proposed cancellation of such contract, and shall have a right to be heard, to present the testimony of witnesses and other evidence bearing

upon the reasons for the proposed cancellation of such contract. No such contract shall be cancelled until the date set for consideration of the cancellation of such contract; nor until after a hearing is held, if such hearing is requested by said teacher; nor until, in the case of teachers, supervisors, and principals, the city or town superintendents, in cities and towns, and the county superintendents, in townships and in cities and towns not having superintendents, shall have given the school corporation his recommendations thereon, and it shall be the duty of such superintendent to present such recommendations upon five days' written notice to him by such school corporation. Nothing contained in this section shall prevent the suspension from duty of any teacher pending a decision on the cancellation of such teacher's contract. Cancellation of an indefinite contract of a permanent teacher may be made for incompetency, insubordination (which shall be deemed to mean wilful refusal to obey the school laws of this state or reasonable rules prescribed for the government of the public schools of such corporation), neglect of duty, immorality, justifiable decrease in the number of teaching positions or other good and just cause, but may not be made for political or personal reasons: Provided, That when the cause of cancellation of an indefinite contract is immorality or insubordination, as defined in this act, such cancellation shall go into effect at once: and, Provided, further, That when the cause of cancellation of an indefinite contract is not immorality or insubordination, as defined in this act, such cancellation shall go into effect at the end of the school term following such cancellation. The school board of any city or town, by a majority vote, evidenced by a signed statement in the minutes of the board, or the township trustee, by a written and signed statement recorded in his records, may can-

cel an indefinite contract with a teacher after compliance with the provisions of this section: Provided, That the decision of the school board shall be final: and, Provided, further, That the decision of the township trustee shall not become effective for ten days, during which time an appeal may be taken to the county superintendent, in which case the county sueprintendent shall investigate the case and make a final decision within five days.

Section 3. No teacher shall be appointed by any school corporation in Indiana, and no teacher shall become a permanent teacher in any such school corporation, until the superintendent, in the case of school cities and school towns, and the county superintendent, in the case of townships and school cities and towns not having superintendents, shall have made a report upon such teacher's preparation, experience, and license, and it shall be the duty of every such superintendent. within ten days after request, to make such report upon any person whom the school corporation is considering as an applicant: Provided, That nothing contained in this section shall be deemed to prevent the granting to any superintendent of additional authority in the selection and employment of teachers either by law or by the rules or regulations of any school corporation.

Section 4. No permanent teacher shall be permitted to cancel his indefinite contract during the school term for which his said contract is in effect nor for a period of thirty (30) days previous to the beginning of such school term unless such cancellation is mutually agreed upon; such permanent teacher shall be permitted to cancel his indefinite contract at any other time by giving a five days' notice to the school corporation. Any permanent teacher cancelling his indefinite contract in any other manner than

in this section provided shall be deemed guilty of unprofessional conduct and the state superintendent is hereby authorized to suspend the license of such teacher for a period of not exceeding one year.

Section 5. Any school corporation, upon written request, may grant leaves of absence, for periods not exceeding one year, to any permanent teacher for study or professional improvement or because of physical disability or sickness, subject to such rules and regulations governing leave of absence as may be adopted by such corporation: Provided, That without written request any school corporation may place a permanent teacher on leave of absence for periods of not exceeding one year because of physical or other disability or sickness: Provided, That such teacher shall have a right to a hearing on such unrequested leave of absence in accordance with the provisions for hearings contained in section 2 of this act.

Section 6. This act shall be construed as supplementary to an act of the general assembly, page 195, acts 1921, entitled, "An act concerning teachers' contracts and providing for the repeal of conflicting laws."

## APPENDIX D.

Indiana Teachers' Tenure Act 1933—Indiana Acts 1933, p. 716.

(Bold-face type—additions to 1927 act. Small Type in brackets—deletions from 1927 act.)

**Teachers—Amendment—When to Become Permanent—Contracts — School Terms — Compensation — Salary Schedule—Uniformity of Contracts.**

Section 1. Be it enacted by the general assembly of the State of Indiana, That section 1 of the above entitled act be amended to read as follows: Section 1. That any person who has served or who shall serve under contract as a teacher in any **(school city corporation or in any school town corporation)** in the State of Indiana for five or more consecutive years, and who shall at any time hereafter enter into a teacher's contract for further service with such corporation, shall thereupon become a permanent teacher of such school corporation. The term "teacher" as used in this section shall mean and include licensed public school teachers, supervisors and principals of all such public school corporations, and licensed assistant superintendents, and superintendents of such school corporations. Upon the expiration of any contract between such school corporation and a permanent teacher, such contract shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract. Such an indefinite contract shall remain in force until such permanent teacher shall have reached the age of sixty-six years unless succeeded by a new contract signed by both parties or unless it shall be cancelled as provided in section 2 of this act; Provided, That teachers'

contracts shall provide for the annual determination of the date of beginning and length of school terms by the school corporation; and, Provided further, That teachers' contracts may contain provisions for the fixing of the amount of annual compensation from year to year by a salary schedule adopted by the school corporation and such schedule shall be deemed to be a part of such contract; Provided further, That such schedule may be changed by such school corporation on or before May first of any year, such changes to become effective at the beginning of the following school year; Provided, That all teachers affected by such changes shall be furnished with printed copies of such changed schedule within thirty days after its adoption; **(and, Provided further, That teachers [']** contracts shall be uniform and of the form and wording as prescribed by the state superintendent of public instruction.)

**Teachers—Indefinite Contract—Amendment—Cancellation—Time and Place of Hearing—Notice to Teacher—Statement of Reasons—Suspension of Teacher—Grounds for Cancellation—Board—Decision—Final.**

Sec. 2. That section 2 of the above entitled act be amended to read as follows: Sec. 2. Any indefinite contract with a permanent teacher as defined in section 1 of this act may be cancelled only in the following manner: Not less than thirty days or more than forty days before the consideration by any such school corporation of the cancellation of any such contract, such teacher shall be notified in writing of the exact date, time when and place where such consideration is to take place; and such teacher shall be furnished a written statement of the reasons for such consideration within five days after any written re-

quest for such statement; and such teacher shall, upon written request for a hearing, filed within fifteen days after the receipts by said teacher of notice of date, time and place of such consideration, be given such a hearing before the school board (In the case of cities and towns, and before the township trustee, in the case of Townships;) of such school corporation; such hearing shall be held not less than five days after such request is filed and such teacher shall be given not less than five days' notice of the time and place of hearing. Such teacher, at the hearing shall have a right to a full statement of the reasons for the proposed cancellation of such contract, and shall have a right to be heard, to present the testimony witnesses and other evidence bearing upon reasons for the proposed cancellation of such contract. No such contract shall be cancelled until the date set for consideration of the cancellation of such contract; nor until after a hearing is held, if such hearing is requested by said teacher; nor until, in the case of teachers, supervisors, and principals, the city or town superintendent shall have given the school corporation his recommendations thereon, and it shall be the duty of such superintendent to present such recommendations upon five days' written notice to him by such school corporation. Nothing contained in this section shall prevent the suspension from duty of any teacher pending a decision on the cancellation of such teacher's contract. Cancellation of an indefinite contract of a permanent teacher may be made for incompetency, insubordination (which shall be deemed to mean a wilful refusal to obey the school laws of this state or reasonable rules prescribed for the government of the public schools of such corporation), neglect of duty, immorality, justifiable decrease in the number of teaching positions or other good and just cause but may not be made for political or personal reasons;

Provided, That when the cause of cancellation of an indefinite contract is immorality or insubordination, as defined in this act, such cancellation shall go into effect at once; and, Provided further, That when the cause of cancellation of an indefinite contract is not immorality or insubordination, as defined in this act, such cancellation shall go into effect at the end of the school term following such cancellation. The school board of any such school corporation, by a majority vote, evidenced by a signed statement in the minutes of the board, may cancel an indefinite contract with a teacher after compliance with the provisions of this section; Provided, That the decision of the school board shall be final.

**Teachers—Condition Precedent to Appointment and/or Making Permanent—Amendment—Superintendent—Statement—Contents—Proviso—Act Construed.**

Sec. 3. That section 3 of the above entitled act be amended to read as follows: Sec. 3. No teacher shall be appointed by any such school corporation in Indiana, and no teacher shall become a permanent teacher in any such school corporation, until the school superintendent shall have made a report upon such teacher's preparation, experience, and license, and it shall be the duty of every such superintendent, within ten days after request, to make such report upon any person whom the school corporation is considering as an applicant; Provided, That nothing contained in this section shall be deemed to prevent the granting to any superintendent of additional authority in the selection and employment of teachers either by law or by the rules or regulations of any such school corporation.

**Leaves of Absence—Periods of—Reasons for—Amendment—School Corporation—Proviso—Right to Hearing.**

Sec. 4. That section 5 of the above entitled act be amended to read as follows: Sec. 5. Any such school corporation, upon written request, may grant leave of absence, for periods not exceeding one year, to any permanent teacher for study of professional improvement or because of physical disability or sickness, subject to such rules and regulations governing leave of absence as may be adopted by such corporation; Provided, That without written request any such school corporation may place a permanent teacher on leave of absence for periods of not exceeding one year because of physical or other disability or sickness; Provided, That such teacher shall have a right to a hearing on such unrequested leave of absence in accordance with the provisions for hearings contained in section 2 of this act.

**Amendment—Act Construed.**

Sec. 5. That section 6 of the above entitled act be amended to read as follows: Sec. 6. This act shall be construed as supplementary to an act of the general assembly, page 195, Acts 1921, entitled "An act concerning teachers' contracts and providing for the repeal of conflicting laws."

## APPENDIX E.

### Teachers' Minimum Wage Act.

Chapter 56, Acts of 1920, Special Session, p. 194 (Burns' Ind. Stats. Ann. 1933, Section 28-4314).

An Act to amend an act to amend section 1 of an act entitled, "An act to amend an act entitled 'an act to amend section 1 of an act entitled an act to classify and regulate the minimum wage of teachers in public schools,' approved March 2, 1907, approved March 1, 1911, and to amend section 2 of an act entitled 'an act to classify and regulate the minimum wages of teachers in public schools,' approved February 28, 1913, approved March 15, 1919."

(H. B. 553. Approved August 4, 1920.)

Section 1. Be it enacted by the general assembly of the State of Indiana, That section 1 of the above entitled act be amended to read as follows: Section 1. That the daily wages of teachers for teaching in the public schools of the state shall not be less in the case of beginning teachers, than an amount determined by multiplying four and one-fourth cents by the general average given such teacher on his highest grade of license at the time of contracting. For teachers having had a successful experience for one school year of not less than six months, the daily wages shall be not less than an amount determined by multiplying four and three-fourths cents by the general average given such teacher on his highest grade of license at the time of contracting. For teachers having had a successful experience of three or more school years of not less than six months each, the daily wages shall not be less

than an amount determined by multiplying five and one-half cents by the general average given such teacher on his highest grade of license at the time of contracting. For teachers having had a successful experience of five or more school years of not less than six months each, the daily wages shall be not less than an amount determined by multiplying six cents by the general average given such teacher on his highest grade of license at the time of contracting. All teachers now exempt from examination shall be paid, as daily wages for teaching in the public schools, not less than an amount determined by multiplying six and one-half cents by the general average of scholarship and success given such teacher: Provided, That the grade of scholarship accounted in each case be that given at the teacher's last examination, and that the grade of success accounted, be that of the teacher's term last preceding the date of contract: And Provided further, That two per cent shall be added to the teacher's general average scholarship and success for attending the county institute the full number of days, and that said two per cent shall be added to the average scholarship of beginning teachers: Provided further, That the minimum paid to any teacher in the common schools of this state shall not be less than $800 per school year.

## APPENDIX F.

The New Jersey Act (as Quoted in Phelps v. Board of Education of Town of West New York, 57 Sup. Ct. Rep. 483).

Section 1 (4 N. J. Com. St. 1910). The service of all teachers, principals, supervising principals of the public schools in any school district of this state shall be during good behavior and efficiency, after the expiration of a period of employment of three consecutive years in that district, unless a shorter period is fixed by the employing board; . . . No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her . . . and after the charge shall have been examined into and found true in fact by said Board of Education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing . . .

## APPENDIX G.

## BIBLIOGRAPHY OF TENURE AND CONTRACTUAL STATUS OF TEACHERS.

### I. Publications of the National Education Association.

#### A. Committee on Tenure.

The reports of the Committee on Salaries, Tenure, and Pensions, appointed by the National Education Association in 1911, appear in the **Proceedings** of the Association for the years 1918 thru 1922. In 1923, this Committee was reorganized into three committees, a separate Committee on Tenure being appointed. Since that time the report of the Tenure Committee has been published annually in the **Proceedings**, in part or in full, with the exception of the years 1932 and 1933. No report was made by the Committee in 1933.

1. Rowland, Albert Lindsay, chairman. **Report of the Committee of One Hundred on Tenure Problems.** 1930. Same: **Proceedings, 1930.** p. 195-97.

   Lists twelve principles of tenure legislation. Cites current studies.

2. Rowland, Albert Lindsay, chairman. **Report of the Committee of One Hundred on Tenure Problems.** 1931. 8 p. Same: **Proceedings, 1931.** p. 264-70.

   Presents abstract of R. W. Homstedt's study of the operation of the New Jersey tenure law.

3. Tall, Lida Lee, chairman. **Report of the Committee of One Hundred on Tenure Problems.** 1932. 18 p. (Mimeo.)

   A study of laws governing the duration of teachers'

contracts. Based on information obtained from school codes, reports, and letters from state and city school officials.

4. DuShane, Donald, chairman. **Report of the Committee on Civil Service for Teachers.** 1934. 42 p. (Mimeo.) Out of print. Excerpts: **Proceedings, 1934.** p. 172-78. Also: **Journal of the National Education Association** 23: 194; November 1934.

   Reports the results of an inquiry among city school superintendents of Indiana. Summarizes the leading tenure cases in nine states.

5. DuShane, Donald, chairman. **Recent Court Decisions on Teacher Tenure.** 1935. 61 p.

   A digest of court decisions concerning teacher tenure which have been rendered in 69 cases during 1932, 1933, and 1934.

6. DuShane, Donald, chairman. "Report of Committee on Tenure." **Proceedings, 1935.** p. 221-24.

   Reviews the extent and need of tenure and summarizes the work of the Committee.

7. DuShane, Donald, chairman. **Teacher Tenure Legislation in 1935 to Date.** July 1935. 38 p.

   Includes a state-by-state survey and the text of tenure bills considered in nine states.

8. DuShane, Donald, chairman. **Court Decisions on Teacher Tenure in 1935.** 1936. 47 p.

   A digest of court decisions concerning teacher tenure

during 1935. Brings uptodate the report listed as item A-5.

9. DuShane, Donald, chairman. **Handbook on Teacher Tenure.** (Preliminary edition.) 1936. 32 p. Printed in final form as the September 1936 **Research Bulletin** (item H-32).

Brings uptodate the material presented in the 1932 tenure report, listed as item A-3.

10. DuShane, Donald, chairman. **1936 Report of the Tenure Committee.** 1936. 14 p. (Mimeo.) Gratis. Abstracts: "Tenure for the Profession." **Journal of the National Education Association** 25: 240; November 1936.

Suggests procedures in tenure campaigns. Discusses teachers' contracts; minimum-salary, retirement, and tenure laws; the superintendent and tenure; and investigations with regard to the dismissal of teachers and superintendents.

11. DuShane, Donald, chairman. **Teachers' Contracts: With Special Reference to Adverse Conditions of Employment.** 1936. 31 p.

A study of several hundred contract forms which reveals the multiplicity of items in contracts, and the discriminatory nature of certain prescriptions imposed upon teachers.

12. DuShane, Donald, chairman. **Court Decisions on Teacher Tenure Reported in 1936.** April 1937. 35 p.

Reviews court decisions on tenure for the calendar year 1936. Brings uptodate two previous reports on court decisions (items A-5 and A-8).

13. DuShane, Donald, chairman. **Mandatory State-Adopted Contract Forms.** June 1937. 31 p.

Presents data indicating that the practise of state-wide uniform contracts has much to recommend it. State contracts omit many adverse conditions of employment reported in the publication, **Teachers' Contracts: With Special Reference to Adverse Conditions of Employment** (reference A-11).

14. DuShane, Donald, chairman. **Minimum-Salary Laws for Teachers.** January 1937. 38 p.

Includes statement in foreword that through uniform contracts and minimum-salary laws the state can prevent many adverse and unreasonable working conditions. Describes the laws and regulations on minimum salaries in the 20 states having specific minimum-salary standards for teachers, and presents facts on the operation of such laws.

15. DuShane, Donald, chairman. **Report of Committee on Tenure.** 1937. 18 p.

Outlines the work and purpose of the tenure committee. Discusses tenure legislation and case investigations of discharged teachers.

B. Department of Classroom Teachers.

16. **The Economic Welfare of Teachers.** Sixth Yearbook, 1931. Chapter 3, "Employment during Efficiency," p. 39-46.

Shows that teachers may assure themselves tenure either through (1) legislation and rules, or (2) contractual provisions. Twelve principles of tenure leg-

islation are stated. Advantages and disadvantages of various types of tenure laws are discussed. Urges that tenure regulations should protect not only the teaching profession but also the educational rights of children.

C. Department of Superintendence (now the American Association of School Administrators).

17. **The Status of the Superintendent.** First Yearbook, 1923. Chapter 7, "The Tenure of Office of the Superintendent of Schools," p. 110-22.

A study of tenure conditions among city school superintendents. Presents data on range in tenure of office, length of terms and length of contracts. Submits recommendations as to bases of selection, term of employment, and conditions which should govern the superintendents' recall and release.

18. **Educational Leadership: Progress and Possibilities.** Eleventh Yearbook, 1933. p. 111-21, 197-205.

Includes information concerning contractual status and tenure of city and rural superintendents of schools.

D. Division of Teacher Welfare.

19. **Teacher Tenure.** 1937. 4 p.

Discusses some of the advantages of tenure.

E. Journal of the National Education Association.

20. Committee on Tenure. "Tenure for the Profession." Vol. 25: 240; November 1936.

Abstracts from the 1936 Report of the Tenure Com-

mittee (item A-10), concerning tenure campaigns; minimum-salary, retirement, and tenure laws; and the superintendent and tenure.

21. DuShane, Donald. "Need for Tenure." Vol. 25: 42; February 1936.

A brief discussion of the advantages of tenure and a plea that teachers support education associations in their efforts to secure tenure.

22. DuShane, Donald. "Superintendent and Tenure." Vol. 24: 156; May 1935.

A general discussion of the problems of tenure with brief comment on the trend toward including superintendents under tenure.

23. Givens, Willard E. "Teacher Welfare to the Front." Vol. 25: 202; October 1936.

Includes a brief section on tenure giving reasons for sound tenure legislation and a chart showing proportion of teachers under various types of state tenure laws.

24. Goldberg, Stella. "Tenure As It Affects the Child." Vol. 24: 279; December 1935.

Discusses the effect of tenure or the lack of tenure upon the mental and physical health of the teacher, with its resultant effect upon the teacher's pupils.

25. Hunter, Fred M. "Tenure for Teachers." Col. 14: 271-75; December 1925.

Favors principle of indefinite tenure and commends law operating in New Jersey. Contrasts the influence

of "hire and fire system" existing so widely in the United States with the security enjoyed by teachers in European countries.

26. Lively, Emery C. "How Louisiana Secured Tenure." Vol. 25: 281-82; December 1936.

Describes efforts to secure tenure in Louisiana since 1931. Gives 14 important factors in enacting the tenure bill now effective in that state.

F. Legislative Commission.

27. **Teaching—Procession or Profession?** 1934. 8 p.

Includes twelve principles to be considered in the framing and operation of tenure plans and gives seven reasons why teacher tenure contributes to school efficiency.

G. Proceedings of the National Education Association

28. Avery, George T., chairman. "Report of Committee on Resolutions." **Proceedings, 1935.** p. 207-16.

29. Kelley, J. Herbert. "Should the Profession thru the National Education Association Provide for the Protection of Teachers and Administrators Who Are Unjustly Treated?" **Proceedings, 1935.** p. 237-38.

Enumerates ways in which the Association might assist teachers and protect its members.

30. Mallory, Gertrude; Frank, Kate; Smith, Esther M.; and Blanchard, H. H. "Teacher Tenure." **Proceedings, 1934**, p. 318-19, 321-25, 327-29.

Four addresses on the California tenure law, attitude of teachers, value of continuous employment, and the Indiana situation.

H. Research Division.

31. "Administrative Practises Affecting Classroom Teachers. Part 2. The Retention, Promotion, and Improvement of Teachers." **Research Bulletin** 10: 33-76; March 1932. "The Term of Employment for Teachers," p. 36-38.

Topics treated are: types of laws and regulations governing duration of teachers' contracts, present practise in city school systems, general principles for establishment of contractual relations, and the use of formal contracts.

32. "A Handbook on Teacher Tenure." **Research Bulletin** 14: 167-94; September 1936.

A study of laws governing the duration of teachers' contracts. Brings uptodate the material presented in the 1932 **Report of the Committee on One Hundred on Tenure Problems** (item A-3).

33. "The Problem of Teacher Tenure." **Research Bulletin** 2: 138-75; November 1924. (Out of print.)

A reprint of the 1924 Report of the Committee of One Hundred on the Problem of Tenure (Fred M. Hunter, chairman), together with additional material on the subject.

34. "A Self-Survey Plan for State School Systems. Part I: Checklists. Part II: Handbook." **Research Bulletin** 8: 67, 81-82, March 1930; 120-24, May 1930.

Sets up ten criteria for judging state administration of teacher employment and contracts, and applies the checklist to Pennsylvania.

35. **State-Adopted Contract Forms for the Employment of Teachers.** June 1936. 19 p. (Mimeo.)

Study of 400 current contract forms used by local school systems and education associations.

36. "Teacher Tenure: An Outline for Study Groups." **Secondary Education** 5: 197-99; September 1936. Washington, D. C.: Department of Secondary Education, National Education Association.

Includes a discussion of the legal status of tenure. Gives 12 basic principles with respect to teacher tenure.

I. Review of Educational Research.

37. Anderson, Earl W. "The Legal Status of the Teacher." Vol. 1: 115-17; 154-55; April 1931.

Reviews briefly studies dealing with legal phases of teacher status, among them employment and causes for dismissal.

38. Butsch, Russell L. C. "Teacher Tenure." Vol. 1: 118-21; 155-56; April 1931.

Reviews studies of teacher turnover, with respect to its causes, extent, and the influence of tenure legislation.

39. Butsch, Russell L. C. "Tenure of Teachers." Vol. 7: 292-95, 345-46; June 1937.

Review of literature for 1934, 1935, and 1936 on teacher turnover and on tenure laws.

40. Edwards, Newton. "The Legal Status of Teachers." Vol. 3: 421-27; 460-62; December 1933.

Reviews briefly studies of teacher status, including those relating to contracts.

41. Elsbree, Willard S. "Tenure of Teachers." Vol. 4: 316-18; 349-51; June 1934.

Reviews studies of tenure laws, teacher turnover, and length of teaching experience.

## II. Publications Other Than Those of the National Education Association.

42. Allen, Ira M. **The Teacher's Contractual Status as Revealed by an Analysis of American Court Decisions.** Contributions to Education, No. 304. New York: Teachers College, Columbia University, 1928. p. 77-79.

States that the principle guiding the dismissal of teachers employed under tenure acts is that they may be removed for cause and in manner prescribed by statute. Reviews certain cases which have arisen, one of which raises problem of distinguishing between dismissal and failure to reemploy.

43. Almack, J. C., and Lang, A. R. **Problems of the Teaching Profession.** Boston: Houghton Mifflin Co., 1925. Chapter 12, "The Teacher's Tenure of Position," p. 215-34.

Briefly reviews the brief and insecure tenure of teachers and its consequences. Considers causes and remedies, and sets forth principles of sound tenure legislation.

44. Anderson, Earl W. **The Teacher's Contract and Other Legal Phases of Teacher Status.** Contributions to Education, No. 246. New York: Teachers College, Columbia University, 1927. 180 p.

An analysis of contract forms, local rules and regulations and state laws and legal decisions to discover legal restrictions placed upon the teacher. Tenure provisions included in contracts, legislation relating to teacher tenure since 1905, and the optimum legal status of the teacher with regard to dismissal and tenure are dealt with in p. 49, p. 128-29, and p. 138-41, respectively.

45. Baldwin, Robert D. "Professional Tenure for Teachers." **American School Board Journal** 94: 43-45; February 1937.

Discusses tenure under the following headings: "Tenure a Two-Way Proposition," "Retaining the Position during Satisfactory Service," "Absurdities in Tenure Legislation," "Professional Tenure Desirable," "Conditions Conducive to Uncertain Tenure," and "The Continuing Contract."

46. Betts, Gilbert L. "The Influence of Teacher Tenure Laws on Supply and Demand." **Journal of Educational Research** 28: 118-31, 175-86; October and November 1934.

The replies of elementary teachers to an inquiry sent out by the National Survey of the Education of Teachers comprise the raw data for this study.

47. Burke, Arvid J. **Understanding Teacher Tenure.** Public Information Service, Circular No. 3. Albany, N. Y.: New York State Teachers Association (152 Washington Ave.), 1936. 5 p. (Mimeo.) Supplement: **Why Tenure for Public School Teachers.** 1937 4 p. (Mimeo.)

A series of questions and answers regarding teacher tenure, some of which relate specifically to New York State.

48. California Teachers' Association, Tenure Committee. "California Teacher Tenure." **Sierra Educational News** 28: 17-21; September 1932.

Reports an investigation of the teacher tenure problem in California. Includes results of a questionnaire sent to boards of trustees and of a questionnaire sent to 1400 classroom teachers. Also gives recommendations from several groups of trustees, administrators, and from some tenure committees.

49. Chambers, Merritt M. "Taking Tenure to Court." **Nation's Schools** 17: 31-32; May 1936.

Reviews certain recent tenure cases. Says that in view of the division of judicial opinion exhibited, it seems that further statutory revision and administrative experience will be necessary before the actual effect of tenure laws in commonly disputed cases can be forecast with much certainty.

50. Clarke, Clarence L. **Tenure of Teachers in the Profession with Special Reference to Wisconsin.** Ann Arbor, Mich.: Annual Press, University of Michigan, 1928. 144 p.

Develops an index of mean tenure of Wisconsin

teachers and seeks to determine the relation of length of service to other characteristics of the teaching personnel, such as training and position held. Reviews previous studies. Urges wider use and further refinement of teacher accounting methods.

51. Cooke, Dennis H. **Problems of the Teaching Personnel.** New York: Longmans, Green and Co., 1933. Chapter 6, "Turnover and Tenure of Teachers," p. 77-95.

General discussion of significance of problem, causes of short tenure, and status of teacher tenure legislation.

52. Couch, Edward B. "Tenure Laws in California." **Nation's Schools** 17: 21; January 1936.

Reviews the changes made in rewriting the California tenure law in 1935. The entire emphasis was placed upon the welfare of the child. leaving the protection afforded the eacher entirely incidental.

53. Cubberly, Ellwood P. **State School Administration.** Boston: Houghton Mifflin Co., 1927. "Appointment and Tenure," p. 642-51.

Describes conditions in American school systems which are responsible for the annual election plan of employing teachers. Gives arguments for and against life tenure, and advocates probationary employment followed by indefinite tenure. Outlines sound state plan for teacher tenure.

54. Dorsey, Susan M., chairman. **Report of the California Commission for the Study of Educational Problems.** Sacramento, Calif.: State Printing Office, 1931. Vol. 1, p. 86-92; Vol. 2, p. 57-59.

Discusses results attributed to the present California

teacher tenure law by laymen, school officials, and teachers. Recommends changes.

55. Edwards, Newton. **The Courts and the Public Schools.** Chicago: University of Chicago Press, 1933. Chapters 14 and 15, p. 402-68.

Reviews court decisions and generally recognized legal principles.

56. Elder, Arthur. "Attacks on Tenure in Michigan." **American Teacher** 21: 13-15; September 1936.

Reviews certain tenure cases in Michigan. Concludes that although the qualities of competence should be a teacher's best safeguard of tenure, in view of the increasing frequency of dismissal for reasons absolutely unconnected with their competence, some form of legal protection is necessary.

57. Engelhardt, Fred. **Public School Organization and Administration.** Boston: Ginn and Co., 1931. p. 176-78, 189-98.

Pages 176-78 present a brief discussion of certain phases of teachers contracts. Pages 189-98 include suggestions as to guiding principles for tenure legislation and point out that tenure laws may never be made to apply to teachers employed in small school districts, who undoubtedly need such protection. Discusses tenure provisions, permanence of teachers, and turnover in the teaching profession.

58. Garber, Lee O. "The Law Governing the Dismissal of Teachers on Permanent Tenure." **Elementary School Journal** 35: 115-22; October 1934.

Notes how teachers who have been placed on permanent tenure may be legally dismissed.

59. Garber, Lee O. "When and How Do Teachers Attain a Permanent Status under Tenure Laws?" **American School Board Journal** 91: 15-16; July 1935.

Discusses the problem of permanent tenure under three heads: (1) when does a probationary teacher become a permanent one? (2) who may achieve tenure? and (3) can a schoolboard legally transfer a permanent teacher from one position to another?

60. Graves, Frank P. **The Administration of American Education.** New York: Macmillan Co., 1932. Chapter 11, "Turnover and Tenure," p. 212-23.

Tells when and how dismissals should be made and describes advantages and disadvantages of permanent tenure. Recommends the teacher's right of appeal to the chief state school officer and a specification of charges in the law.

61. Hodgdon, Daniel R. "Teachers' Tenure." **Yearbook of School Law, 1937.** (Edited by M. M. Chambers.) Washington, D. C.: American Council on Education, 1937. p. 30-44.

Reviews court decisions on tenure. Similar reviews have been included in the **Yearbook of School Law** since it was first issued in 1933.

62. Holmstedt, Raleigh W. **A Study of the Effects of the Teacher Tenure Law in New Jersey.** Contributions to Education, No. 526. New York: Teachers College, Columbia University, 1932. 111 p.

A study of the effects of the New Jersey teacher tenure law on the stability of the teaching staff, the professional improvement of teachers, and procedures of

personnel administration. As a check upon the findings for New Jersey, an analysis was made of conditions in the state of Connecticut where no tenure law exists, and yet where other factors (history, population, industrial developments, educational leadership, etc.) are closely comparable.

63. Kandel, Isaac L. "Tenure of Service of Teachers." **Teachers College Record** 26: 127-44; 197-204; October and November 1924.

Declares that the problem of tenure turns, not on the rights of teachers, but on the question of how to secure competent service in the schools. Discusses attitude of courts.

64. Lewis, E. E. **Personnel Problems of the Teaching Staff.** New York: Century Co., 1925. Chapters 16 and 17, p. 328-62.

Defines turnover in terms of replacements and discusses its causes and the need for more accurate statistical information as to its extent. Surveys methods used in measuring tenure, and sets forth principles to be considered in formulating state laws and local regulations. Lists arguments for and against long tenure.

65. Lund, John. "Administrator Looks at the Schools and Democracy; a Reply to Myers' 'Will Education go Democratic?'" **Clearing House** 11: 479-82; April 1937. (See reference No. 67.)

In answering Dr. Myers' proposal regarding appointments, promotions, and dismissals, says that this responsibility could not be delegated to an elected staff committee without a revolutionary change in the fun-

damental and traditional concept of the source of control in American education.

66. Murphy, Asael B. "What Shall We Do With Teacher Tenure?" **American School Board Journal** 90: 14; April 1935.

Contends that legislation is not a solution. Advocates indefinite tenure.

67. Myers, Alonzo F. "Will Education Go Democratic?" **Clearing House** 11: 263-67; January 1937. Excerpts: **Education Digest** 2: 15-17; March 1937. (See reference No. 65.)

Proposes among other things, that all professional appointments, promotions, and dismissals should be made upon recommendation of a personnel committee made up of staff members elected by the teaching staff (assuming that there is an expert, professionally-minded teaching staff).

68. Newlon, Jesse H. "Security for School Administrators." **School Executive** 56: 11-13; September 1936.

Discusses various aspects of security for administrators. Says that this is a critical problem that needs to be squarely faced.

69. Peterson, A. G. "Turnover of Rural Teachers." **Educational Administration and Supervision** 16: 659-67; December 1930.

A summary of conditions and factors relating to tenure of rural teachers in various sections of the United States during the past decade.

70. Scott, Cecil W. **Indefinite Teacher Tenure.** Contributions to Education, No. 613. New York: Teachers College, Columbia University. 1934. 165 p. Abstract: **Teachers College Record** 36: 22-23; January 1935.

Develops guiding principles for indefinite tenure. Studies the provisions of tenure laws and their operation, and also the problem of tenure in six European countries.

71. Seyfried, J. E. **Contractual Status of California City School Superintendents.** Publications in Education, Vol. 7, No. 2. Berkeley, Calif.: University of California, 1933. 82 p.

Concluded that large majority of superintendents have practically no professional status than can be legally enforced.

72. Seyfried, J. E. **Employment Contracts of City School Superintendents.** University of New Mexico Bulletin, Education Series, Vol. 8, No. 2. Albuquerque, N. Mex.: University of New Mexico Press, 1934. 60 p.

This study discusses the law of contracts, legal principles pertaining to contracts of city school superintendents, and contract forms.

73. Simon, Donald L. "Opposed to a Teacher-Tenure Law." **Nation's Schools** 17: 22; June 1936.

During a recent investigation, it was found that county and town superintendents in Indiana were opposed to teacher-tenure legislation. Offers two suggestions as to how this opposition might be overcome.

74. Stevenson, Fred G. "Legal Aspects of Teachers' Contracts." **American School Board Journal** 81: 60, 128; November 1930.

Thirty-five states require written teachers' contracts with some or all schoolboards. Statutory requirements as to stipulations in the contract vary. Most common stipulations are as to the salary and term.

75. "Tenure Can Be Won." **American Teacher** 21: 4; November 1936.

Says that a united campaign for tenure supported by all teachers' organizations by progressive citizens' groups, and by labor has a good chance for success.

76. Trusler, H. L. **Essentials of School Law.** Milwaukee, Wis.: Bruce Publishing Co., 1927. p. 194-216.

Statutory provisions and legal principles governing rights of boards of education to dismiss teachers, causes for dismissal, procedure to be observed in dismissing teachers, and damages for wrongful dismissal are dealt with in the pages cited.

77. Voorhees, Harvey C. **The Law of the Public School System of the United States.** Boston: Little, Brown and Co., 1916. Sections 64 and 69, p. 143-50, 159-66.

Cites court decisions under the headings "Contract of Employment," and "Discharge, Removal, and Suspension."

78. Wittke, Carl, chairman. "Academic Freedom and Tenure." Report of Committee A at the annual meeting December 29, 1936. **Bulletin of the American Associa-**

**tion of University Professors** 23: 103-108; February 1937.

Summarizes work of the Committee since 1932 and makes suggestions for future activities.

79. Zeliff, L. A. "How the Superintendent May Make His Tenure Permanent." **American School Board Journal** 93: 20-21; October 1936.

Says that the man who wants to hold his job can do so by practising some of the fundamental principles of successful administration and human behavior.

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IN THE

# Supreme Court of the United States

October Term, 1937

## No. 256

State of Indiana on relation of DOROTHY ANDERSON, Petitioner,

vs

Harry Brand, Trustee of Chester School Township of Wabash County, Indiana

REPLY OF HARRY BRAND, TRUSTEE OF CHESTER SCHOOL TOWNSHIP, WABASH COUNTY, INDIANA, TO PETITION OF RELATOR DOROTHY ANDERSON EX REL STATE OF INDIANA FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

Raymond Brooks and George C. Gertman,
Attorneys for above named Respondent

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To the honorable Chief Justice and the associate justices of the Supreme Court of the United States:

The respondents object to the granting of a writ of certiorari and respectfully submit to this court that no question of "general national importance" and / or no "federal question of substance not heretofore determined by this court" is either involved or presented; the sole question decided by the Supreme Court of the state of Indiana is that no legislature can so bind future legislation in the matter of the regulation of education so as to prevent future legislation changing or repealing such regulation theretofore adopted by any legislature, the regulation of the educational system of the state being for the public welfare and bene-

fit and that teachers cannot obtain vested rights in any of the regulatory privileges granted thereby.

No question of contract is involved, teacher's tenure rights being statutory rights rather than contractual.

Furthermore, the decision of the Supreme Court of the State of Indiana is consonant with the principles of law established by the United States Supreme Court in Phelps vs The Board of Education of West New York—Askam vs The Board of Education of West New York, 57 Supreme Court Report 483, in which this honorable court said—

"'the position of the appellants is that by virtue of the act of 1909 three years of service under contract confers upon an employee of a school district a contractual status indefinite in duration which the legislature is powerless to alter or authorize the Board of Education to alter. The Supreme Court holds that the act of 1909 "established a legislative status for teachers but we fail to see that it established a contractual one that the legislature may not modify. ———The status of tenure teachers while in one sense contractual, is in essence dependent on a statute like that of the incumbent of a statutory office which the legislature at will may abolish, or whose emoluments it may change."

This court is not bound by a decision of a state court as to the existance and terms of a contract, the obligation of which is asserted to be impaired, but where a statute is claimed to create a contractual right we give weight to the construction of the statute by the courts of the state. Here those courts have concurred in holding that the act of 1909 did not amount to a legislative contract with the teachers of the state and did not become a term of the contracts entered

into with employees by the Board of Education. Unless these views are palpably erroneous we should accept them. ———we agree with the courts below that this was but a regulation of the conduct of the board and not a term of a continuing contract of indefinite duration with the individual teacher."

The Supreme Court of Indiana likewise said in the instant case, "the tenure statute was only intended as a limitation upon the plenery power of local school officials to cancel contracts and cannot be, a limitation upon the power of future legislatures to change the law respecting teachers and their tenure", and further in opinion denying rehearing the court said "on petition for rehearing, appellant earnestly contends that the decision of this case gives a retroactive effect to a statute, and permits the impairment of the obligation of a binding contract. The original opinion was intended to be understood as expressing the view that no contractual right to be continued as a teacher from year to year is involved———the tenure statute, in effect, grants a privilege to the teacher who has served five years, and signed a new additional contract to continue as a teacher, under certain conditions, by limiting the power of the local school officers to employ any one in the place of a tenure teacher. The teacher had no contractual right to continue in employment. The statute————required that the tenure teacher be reemployed unless there was necessary a reduction in the number of teachers;" the court further said "the right to control public policy in respect to the management and operation of schools, cannot be contracted away by one legislature so as to fix a permanent public policy, ————unchangeable by succeeding legislatures. ———Since the opinion was filed, the Supreme Court of the United States has

sustained————in appeals from two cases involving a situation comparable in all substantial respects with the case at bar, Phelps, etc." (cited above.)

The courts have also decided the fundamental question of the right of legislatures to change or repeal rights obtained by legislative enactment in the case of Rowekamp, et al v Mercantile Etc., 8th circuit court of appeals 72nd Federal Report 2nd series page 852 in which the court said "there are certain inherent powers in the government to enact laws to protect, ————and general welfare of society. This power———— has been said, to be as broad as the public welfare. (needs). It is an inherent attribute of sovereignty with which the state is endowed for the protection and general welfare of its citizens, and of which the state may not deprive itself, one state legislature cannot bind itself or its successors not to exercise this attribute of sovereignty, and all contracts whether made by the state itself, by its municipalities or by individuals are subject to be interfered with or otherwise affected by the subsequent statutes enacted in the bona fide exercise of the police power, and such legislative acts are not within the contract clause of the constitution."

The basic principals involved in this case and the New Jersey cases decided by this court are the same, viz; is a permanent indefinite tenure right created by statutory enactment regulating the employment of school teachers a vested right and binding on future legislation in that field so that such permanent indefinite tenure may not be changed or taken away by future legislation after a teacher has acquired tenure status.

Thus it may be observed that the fundamental principals of law established by this honorable court

in the cases cited above are decisive of the same questions as presented by petitioner.

This question being a matter of the regulation of public schools in the State of Indiana, it therefore could not present a matter of "general national importance".

There being no question presented within the rules of the United States Supreme Court for the granting of a writ of certiorari and there being no special or important reasons for invoking the judicial discretion of this court to grant such a writ in this case, it is respectfully submitted that the petition is without merit and the application for a writ of certiorari should be denied.

Raymond Brooks
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George C. Gertman,
Washington, D. C.

Attorneys for above named Respondent

# APPENDIX A

## INDIANA TEACHERS' TENURE ACT 1933
## INDIANA ACTS 1933, p 716

(Bold face type—additions to 1927 act. Small Type in brackets—deletions from 1927 act.)

**Teachers—Amendment—When to Become Permanent —Contracts—School Terms—Compensation—Salary Schedule—Uniformity of Contracts.**

Section 1. Be it enacted by the general assembly of the State of Indiana, That section 1 of the above entitled act be amended to read as follows: Section 1. That any person who has served or who shall serve under contract as a teacher in any **(school city corporation or in any school town corporation)** in the State of Indiana for five or more consecutive years, and who shall at any time hereafter enter into a teacher's contract for further service with such corporation, shall thereupon become a permanent teacher of such school corporation. The term "teacher" as used in this section shall mean and include licensed public school teachers, supervisors and principals of all such public school corporations, and licensed assistant superintendents, and superintendents of such school corporations. Upon the expiration of any contract between such school corporation and a permanent teacher, such contract shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract. Such an indefinite contract shall remain in force until such permanent teacher shall have reached the age of sixty-six years unless succeeded by a new contract signed by both parties or unless it shall be cancelled as provided in section 2 of this act; Provided, That teachers' contracts shall provide for the annual determination of the date of beginning and length of school terms by the school corporation; and,

Provided further, That teachers' contracts may contain provisions for the fixing of the amount of annual compensation from year to year by a salary schedule adopted by the school corporation and such schedule shall be deemed to be a part of such contract; Provided further, That such schedule may be changed by such school corporation on or before May first of any year, such changes to become effective at the beginning of the following school year; Provided, That all teachers affected by such changes shall be furnished with printed copies of such changed schedule within thirty days after its adoption; **(and, Provided further, That teachers ['] contracts shall be uniform and of the form and wording as prescribed by the state superintendent of public instruction.)**

**Teachers—Indefinite Contract—Amendment — Cancellation—Time and Place of Hearing—Notice to Teacher— Statement of Reasons—Suspension of Teacher—Grounds for Cancellation—Board—Decision—Final.**

Sec. 2. That section 2 of the above entitled act be amended to read as follows: Sec. 2. Any indefinite contract with a permanent teacher as defined in section 1 of this act may be cancelled only in the following manner: Not less than thirty days or more than forty days before the consideration by any such school corporation of the cancellation of any such contract, such teacher shall be notified in writing of the exact date, time when and place where such consideration is to take place; and such teacher shall be furnished a written statement of the reasons for such consideration within five days after any written request for such statement; and such teacher shall, upon written request for a hearing, filed within fifteen days after the

receipts by said teacher of notice of date, time and place of such consideration, be given such a hearing before the school board **(in the case of cities and towns, and before the township trustee, in the case of Townships;)** of such school corporation; such hearing shall be held not less than five days after such request is filed and such teacher shall be given not less than five days' notice of the time and place of hearing. Such teacher, at the hearing shall have a right to a full statement of the reasons for the proposed cancellation of such contract, and shall have a right to be heard, to present the testimony witnesses and other evidence bearing upon reasons for the proposed cancellation of such contract. No such contract shall be cancelled until the date set for consideration of the cancellation of such contract; nor until after a hearing is held, if such hearing is requested by said teacher; nor until, in the case of teachers, supervisors, and principals, the city or town superintendent shall have given the school corporation his recommendations thereon, and it shall be the duty of such superintendent to present such recommendations upon five days' written notice to him by such school corporation. Nothing contained in this section shall prevent the suspension from duty of any teacher pending a decision on the cancellation of such teacher's contract. Cancellation of an indefinite contract of a permanent teacher may be made for incompetency, insubordination (which shall be deemed to mean a wilful refusal to obey the school laws of this state or reasonable rules prescribed for the government of the public schools of such corporation), neglect of duty, immorality, justifiable decrease in the number of teaching positions or other good and just cause but may not be made for political or personal reasons;

Provided, That when the cause of cancellation of an indefinite contract is immorality or insubordination, as defined in this act, such cancellation shall go into effect at once; and, Provided further, That when the couse of cancellation of an indefinite contract is not immorality or insubordination, as defined in this act, such cancellation shall go into effect at the end of the school term following such cancellation. The school board of any such school corporation, by a majority vote, evidenced by a signed statement in the minutes of the board, may cancel an indegnite contract with a teacher after compliance with the provisions of this section; Provided, That the decision of the school board shall be final.

**Teachers—Condition Precedent to Appointment and / or Making Permanent—Amendment — Superintendent—Statement—Contents—Proviso —Act Construed.**

Sec. 3. That section 3 of the above entiled act be amended to read as follows: Sec. 3. No teacher shall be appointed by any such school corporation in Indiana, and no teacher shall become a permanent teacher in any such school corporation, until the school superintendent shall have made a report upon such teacher's preparation, experience, and license, and it shall be the duty of every such superintendent, within ten days after request, to make such report upon any person whom the school corporation is considering as an applicant; Provided, That nothing contained in this section shall be deemed to prevent the granting to any superintendent of additional authority in the selection and employment of teachers either by law or by the rules or regulations of any such school corporation.

**Leaves of Absence — Periods of — Reasons for — Amendment — School Corporation — Proviso—**

**Right to Hearing.**

Sec. 4. That section 5 of the above entitled act be amended to read as follows: Sec. 5. Any such school corporation, upon written request, may grant leave of absence, for periods not exceeding one year, to any permanent teacher for study or professional improvement or because of physical disability or sickness, subject to such rules and regulations governing leave of absense as may be adopted by such corporation; Provided, That without written request any such school corporation may place a permanent teacher on leave of absence for periods of not exceeding one year because of physical or other disability or sickness; Provided, That such teacher shall have a right to a hearing on such unrequested leave of absence in accordance with the provisions for hearings contained in section 2 of this act.

**Amendment—Act Construed.**

Sec. 5. That section 6 of the above entitled act be amended to read as follows: Sec. 6. This act shall be construed as supplementary to an act of the general assembly, page 195, Acts 1921, entitled "An act concerning teachers' contracts and providing for the repeal of conflicting laws."

## APPENDIX B

**The Constitution of the State of Indiana, Article 8 Sec. 1.**

Sec. 1. Common Schools. Knowledge and learning, generally diffused throughout a community, being essential to the preservation of free government; It shall be the duty of the General Assembly to encour-

age, by all suitable means, moral, intellectual, scientific, and agriculture improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, equally open to all.

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CHARLES ELMORE CROPLEY

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

No. 256.

STATE OF INDIANA on the Relation of
DOROTHY ANDERSON,
Petitioner,

vs.

HARRY BRAND, Trustee of CHESTER SCHOOL TOWNSHIP OF WABASH COUNTY, INDIANA.

## RESPONDENT'S BRIEF.

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# SUPREME COURT OF THE UNITED STATES.

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No. 256.

STATE OF INDIANA on the Relation of
DOROTHY ANDERSON,
Petitioner,

vs.

HARRY BRAND, Trustee of CHESTER SCHOOL TOWNSHIP OF WABASH COUNTY, INDIANA.

## RESPONDENT'S BRIEF.

I.

### OPINIONS OF THE COURT.

(a) The first majority opinion of the Supreme Court of the State of Indiana is reported in 5 N. E. (2d) 531, Cause No. 26,560 (R. pp. 13, 14 and 15).

(b) The majority opinion of the State Supreme Court rendered upon petitioner's petition for rehearing is re-

ported in 7 N. E. (2d) 777, in the same cause (R. pp. 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28).

(c) The dissenting opinion of Judge Treanor is reported in 5 N. E. (2d) 913 (R. pp. 31, 32, 33 and 34).

The official reports of these opinions have not yet been published.

## STATEMENT OF THE CASE.

Respondent accepts petitioner's statement of the case as correct, but will briefly repeat that petitioner sought by mandamus in the County or Circuit Court to compel her reinstatement as a permanent teacher under the terms of the 1927 Teachers Tenure Act of Indiana, which was repealed in 1933 and prior to the commencement of this action by the petitioner (repealed as to township teachers, and petitioner was a teacher in a township school corporation). Trial court sustained demurrer based on lack of right of action as predicated upon a repealed statutory right, which demurrer was sustained; petitioner refused to plead further and judgment was rendered against her. The Indiana Supreme Court affirmed the decision of the trial court.

## WHAT THE ISSUES WERE IN THE INDIANA SUPREME COURT.

Respondent accepts petitioner's statement here.

## SUMMARY OF ARGUMENT.

1. The educational system of the State of Indiana is reserved in the state's plenary power and cannot be exhausted by exercise nor delegated or alienated.

C. J., Vol. 12, p. 912, Sec. 423;
R. C. L., Vol. 26, p. 162;
**Rowekamp et al. v. Mercantile etc., 72nd Fed. R., 2nd Series, p. 852;**
Grt. Northern Ry. Co. v. United States, 155 Federal Rep., pp. 945-959;
Follet v. Sheldon, Treas., 195 Ind. Sup. 510, 144 N. E. 867;
Hagenback etc. Show Co. v. Randall, 75 Ind. App. 417-424;
Central Union Tel. Co. v. Ind'n'plis Tel. Co., 189 Ind. Sup. 210-224;
Barbier v. Connoly, 113 U. S. 27, 28 L. Ed. 923;
U. S. v. U. S. Shoe Co., 264 Fed. 138, 151;
Article 8, Sec. I, Constitution of Indiana;
Appendix C, page 50.

2. The burden of establishing a contractual relationship created by statute is on the proponent of such relationship and the presumptions shall be against such contractual construction.

Dodge v. Board of Education, Vol. 58, No. 2, U. S. Sup. Ct. Rep., pages 98-100:

> "The presumption is that such a law (tenure) is not intended to create private contractual or vested rights, but merely declares a policy • • •. He who asserts the creation of a contract with the state has the burden of overcoming that presumption."

Yard v. New Jersey, 95 U. S. 352, 354:

"The principle function of a legislature is not to make contracts, but to make laws. • • •

"Unless forbidden by some exceptional constitutional provision, the same authority that can make a law can repeal it."

3. The Indiana Tenure Statute did not create a legislative contract.

A. All sections of statute and related statutes must be read together to determine intent of Legislature and the requirement of annual contracts and distinction of terms of relationship of teacher from clause stating that teacher becomes a permanent teacher by executing a contract for further service shows that Legislature did not intend to create a contractual tenure right, but thus made such distinction between the legislative tenure rights and the contractual rights as to salary and services.

Appendix A-G, pages 35 to 55;
Phelps v. Board of Education of W. N. Y.;
Askam v. Board of Education of W. N. Y., 27 Sup. Ct. Rep. 483, 484;
Dodge v. Board of Education, 58 Sup. Ct. Rep. 98-100;
Ratcliff v. Dick Johnson Sch. Twnshp., 204 Ind. 525;
Jones v. Kerr, 5 N. E. (2nd) 533;
State ex rel. Lock v. Craig Schl. Twnshp., 5 N. E. (2nd) 632;
In Re Miller, 74 Fed. Rep. (2nd) 86, 87;
Holden v. Stratton, 198 U. S. 202, 25 S. Ct. 656.

B. The United States Supreme Court is bound by the construction of the State Supreme Court as to the con-

struction of a statute of the state and determination of legislative intent.

Sauer v. New York, 206 U. S. 536, 546;
Fox River Co. v. Railroad Co. Comm., 274 U. S. 655.

C. The United States Supreme Court shall only take cognizance of an issue on the application of a statute if the construction of the State Supreme Court brings such application within the purview of the contract clause of the Federal Constitution.

(1) If the Supreme Court determines that the construction of the state court brings the application of the Teacher Tenure Statute of Indiana of 1927 within the contract clause of the Constitution, then it shall give the application given it by the state court great consideration and weight and will only interfere therewith if palpably erroneous.

Phelps v. Board etc., supra:

> "Here those courts have concurred * * * did not become a contract entered into with the employees by the Board of Education. Unless these views are palpably erroneous we should accept them."

4. If the Supreme Court of the United States should determine that the construction of the Tenure Statute of Indiana is within its purview, and that the state court was in error in deciding that said statute did not create a contractual right, then respondent should still prevail for the reason that if said statute was intended to create a contractual right to indefinite permanent tenure, then said intended contract fails for want of mutuality of consideration.

A. Skill and ability may be held to be proper consideration for a contract, but, under the Indiana Tenure Law of 1927, the teacher offered no more skill and ability the sixth year (year tenure rights accrue) than she did the first five years of probationary employment.

(1) An agreement to do something that a person is already bound to do will not furnish consideration for a contract.

> Musgrove v. D. E. Luther Pub. Co., 63 S. E. 52, **54**:
> "a 'past consideration' is one which has served its purpose in former transaction, and it is not sufficient to support a contractual guaranty. Where such a contract is created subsequent to the main contract it must be supported by a new consideration."
>
> Witt v. Wilson, 160 S. W. 308, **310**;
> Good v. Martin, 95 U. S. 90;
> McNaught v. Fisher, 96 Fed. 168;
> Favorité, Adm., v. Stidham, 84 Ind. Sup. 423, **426**;
> Clod Felter v. Hulet, 72 Ind. Sup. 137, **145**;
> Moyer et al. v. Brand, 102 Ind. Sup. 301, **305**;
> Bridges, Adm., v. Blake et al., 106 Ind. Sup. 332, **333**.

5. The Supreme Court of Indiana has never construed the tenure rights under the Indiana Tenure Laws of 1927 to be contractual.

A. The previous decisions of said Court merely held that the tenure law did not change the contractual relationship of the teacher and school corporation in her employment, not becoming officers by virtue of their tenure.

B. The Indiana teachers' contracts provided, in effect, that the school corporation agreed to be bound by the terms of the Teachers' Tenure Act of 1927.

(a) Such a provision gave no more right than the statute itself, and the provisions of the statute would have been binding if no clause recognizing the act were placed in their contract or if no written contract was made.

(1) Such annual contracts expired annually and so with the rights thereunder.

Opinion in instant case;
Brumfield v. State ex rel. Wallace, 190 N. E. 863;
Hall v. Delphi-Deer Creek etc., 189 N. E. 527.

6. Even if there is a conflict in the decisions of the Indiana Supreme Court on this subject, and even if such decisions are irreconcilable, it is not within the power or duty of this Court to resolve such conflict of decisions and announce a uniform rule to be deduced from such conflict of decisions, as the final determination of the law and policy of a state must be for the final determination by the State Supreme Court.

Sauer v. New York, 206 U. S. 536, 546 (quotation in argument, page 19);
Fox River Co. v. Rr. Co. Comm., supra.

7. If the Supreme Court should determine that the Indiana Teachers' Tenure Law of 1927 created a legislative contract with the teachers, we still urge that the Legislature could abrogate such a contract by virtue of the police power of the state.

A. It is inimical to the public welfare of the people of the State of Indiana to limit the choice of re-employment of teachers.

(1) The security of permanent employment discourages progress and advancement of teachers by removing compulsion for such advancement and progress to retain em-

ployment, thus tending to produce lack of progress in education of children.

(2) Even inures to disadvantage of teachers by encouraging school corporation to discharge teachers at end of fifth year to prevent said teacher becoming a permanent teacher and producing instability of teaching staffs and organization thereof.

Levy v. State, 161 Ind. Sup. 251, **258**:

> "Those who assail a statute of this kind upon the ground that it is not a legitimate exercise of the police power be able to show that the act, etc., * * * or regulated **is not** injurious to the public, or likely to impair the public welfare."

S. H. Kress & Co. v. Johnson, 16 C. C. A. 32;
Nebbia v. New York, 291 U. S. 502;
Sauer v. New York, supra.

8. A statute divesting the state's plenary powers must be strictly construed to divest no more power than is clearly and unconditionally intended.

Hall et al. v. State Board of Assessment and Review, 58 Sup. Ct. U. S. No. 2, pp. 102, **104**;
Central Union etc. v. Indpls. Tel. Co., supra.

A. The Indiana Teacher Tenure Law of 1927 was only intended as a limitation of the authority of the township school corporation to cancel contracts, and not a complete surrender of the state's control over the policy of employment of teachers so as to bind future legislation.

B. Teachers' tenure acts are based upon the policy of protecting the educational interests of the state, and not a

policy of granting special privileges to teachers of a certain class.

Phelps v. Board of Ed. etc., supra;
Dodge v. Board of Education, supra;
Decision of Indiana Supreme Court in instant case.

C. A statute addressed to no particular person does not create a contract and therefore creates no vested right, and may therefore be repealed at any time.

U. S. v. U. S. Shoe etc. Co., 264 Fed. 138, 151.

9. This Court has determined the question involved in the case at bar, there being no more rights created by the probationary **period of employment** being without written contract than when such employment is by written contract.

Phelps v. Board etc., supra;
Dodge v. Board of Education, supra.

A. Both the New Jersey and Indiana Acts provide that continued service, after a probationary period of employment, gives the teacher an indefinite tenure of employment subject to cancellation for statutory causes.

Appendix B, page 45, Indiana Act;
Appendix H, page 56, New Jersey Act.

(1) There is no more virtue attached to contractual rights created by written contract than otherwise.

## ARGUMENT.

Let us first observe what occurs between petitioner and respondent pursuant to the laws of Indiana relative to the employment of teachers. The employment was to be resolved into a uniform written contract specifying certain details of services to be rendered and salary to be paid and the length of the term of teaching. Said contracts were to be executed annually. Then, after the petitioner had served five consecutive years as a teacher in respondent school corporation and thereafter entered into a teacher's contract for further service, she thereupon became, by virtue of the 1927 act, a permanent teacher of the respondent school corporation.

We shall examine the 1927 Teacher's Tenure Act of Indiana. The statute says, "* * * who shall serve under a contract as a teacher * * * for five consecutive years, and who shall hereafter **enter into a teachers contract for further services** * * * shall thereupon become a permanent teacher * * *." Thus, we see that the Legislature distinguished between the contractual employment status and the tenure rights as a permanent teacher. The act did not provide that after five years of contractual service the school corporation shall enter into a written contract providing that said teacher shall be employed as a permanent teacher and said employment contract shall continue indefinitely subject to cancellation as directed in said act.

We do not admit that a statute providing for the execution of a permanent contract would prevent a permanent contract executed in pursuance of said statute from being affected by subsequent legislation on the subject of regulation of the school system of the state, but only point out the distinction in the Indiana tenure act to show that said

act did not provide for the execution of a permanent contract supplementary thereto. If the Legislature had so intended it could have said so—it did state specifically as to what the terms of the employment contract should be, covering all of the fundamental phases of a teacher's employment relationship with the school corporation. It does provide as follows, "upon the expiration of any contract between the school corporation and a permanent teacher, such contract (the contract made the sixth consecutive year of service), shall be deemed to continue in effect for an indefinite **period** and shall be known as an indefinite contract." Although this clause of the statute is ambiguous in that it provides that upon the expiration of the contract it shall continue, inconsistent expressions, yet a sensible construction shows it means that at the expiration of the year term for which the sixth year contract provides (further indicating the annual basis of contracts) said contract as then executed shall remain in force indefinitely and shall be known as an indefinite contract; thus, when the term "contract" is used throughout the statute it refers to this last contract which is to continue indefinitely from year to year by virtue of the tenure statute and the term "contract" as used in the statute does not refer to the permanent tenure right granted in the first part of the act. Thus, while the employment relationship is contractual and rests upon mutual consideration, the tenure rights or the right to the continued enforcement of such contractual rights are a creature of the statute and dependent upon the license or grant of said statute.

Putting it another way, as long as the legislative grant existed, the contractual employment right and the tenure right ran along together, the employment relationship's continuance dependent upon the tenure grant, otherwise

the last contract referred to would expire as the statute says.

The statute, in effect, said—but for the legislative grant the Legislature gives, the teacher contract entered into the sixth consecutive year would expire at the end of that school year the same as the other five previous consecutive years, showing that the Legislature intended that the continuation of the employment contract should be dependent on the legislative license or grant.

Compare this with the New Jersey teachers tenure act which the petitioner attempts to distinguish from the Indiana tenure law. That act provides that after three consecutive years of employment, which certainly is a contractual relationship as sacred as if created by the written contract as under the Indiana law, and that employment or relationship between the employing corporation and the teacher shall continue thereafter indefinitely during good behavior and efficiency and cannot be discharged except for stated causes provided in the act. Once the contract of employment is entered into whatever vested rights may accrue therefrom are the same, be the contract written or oral. Thus, there is no fundamental difference between the Indiana and the New Jersey tenure laws. Each limits the right of employing school corporation to terminate the employment relationship of teacher and school corporation after a probationary period of employment, except for certain statutory causes.

The only distinction claimed by the petitioner is the requirement of a written contract of employment in the case of the Indiana act and the lack of reference or provision for a written contract of employment in the New Jersey act. What is the difference whether such employment is by written contract or oral contract? The rights obtained by the one are no more sacred than the other.

Clearly, in both cases, the legislation is intended for the purpose of the regulation of the policy of employment by school corporation as to the tenure of teachers employed, providing a limitation on the right to discharge teachers, providing the method of discharge, the causes therefor and the method of employment and was not intended as a term of a continuing contract of indefinite duration which the school corporation should enter into with the individual teacher.

The petitioner cites cases on the proposition that the employment relationship is contractual as distinguished from a public office or other relationship. We do not deny this, but nowhere do they cite an Indiana or federal decision holding that the indefinite right to the continuance in the employment relationship perforce a statute is contractual.

The quotation on page 31 of petitioner's brief from the School City of Elwood et al. v. State ex rel. Griffith, 203 Indiana 626, "the position of a teacher—not a public office, but an employment contract between the teacher, etc. The relationship remains contractual • • • under • • • a teacher tenure law • • •." This merely says that the tenure law does not change the employment relationship as contractual, but does not hold that the tenure right to the continued enforcement of such contractual relation is contractual.

If the petitioner seriously urges the matter of construction or intent of the Indiana Legislature relative to the repealed tenure rights, we are willing to look into the record on that subject as shown in the copy of the record of the Senate and House Journals of the legislative proceedings during the discussion and enactment of the 1933 Indiana Tenure Act as set out in Appendix A on page 35. Section 5 of the act as originally passed by the Senate of the Indiana General Assembly reads as follows:

"Section 5. That section 6 of the above entitled act be amended to read as follows: Section 6. Nothing contained in this act shall be so construed as to affect the contract or the legal status of any teacher who, at the time of the passage of this act, has become a permanent teacher, under the terms and conditions of the act of which this is amendatory, but such teacher shall be and remain a permanent teacher, under the terms of such contract, as he would have done if this act had not been passed. This act shall be construed as supplementary to an act of the General Assembly, page 195, Acts 1921, entitled 'An act concerning teachers' contracts and providing for the repeal of conflicting laws.'" (Stricken in final passage.)

The act as **passed by the Senate** would clearly indicate a distinction between the tenure rights and the contractual rights in that said section referred to contract or the legal status of any teacher, the "or" being a conjunctive or meaning "and," and the additional qualifications stating that who has become a permanent teacher, and the closing phrase of that sentence, "as he would have done if this act had not been passed." In other words, the Legislature understood that the repeal of the Teachers' Tenure Act of 1927 as to township teachers would have terminated those rights unless saved, otherwise, it would not have been necessary to have considered the enactment of the above saving clause.

By reading the journal entries (Appendix A, page 35) of the House it will be seen that the House of Representatives struck out the saving clause as passed by the Senate and by comparison with the act finally enacted it will be seen that such saving clause was stricken out, indicating clearly that the Legislature intended that the repeal of the 1927 Tenure Act by the 1933 Tenure Act was intended to affect teachers then on tenure.

The petitioner insists that the use of the word "contract" throughout the act is an indication of legislative intent to treat the tenure rights accruing under the 1927 Act as contractual. I believe that I have sufficiently clarified that point, yet on the question of the use of the word "contract" I submit that the Court is not bound to assume that technical words shall always be understood according to their technical import. In Dworkins v. Caledonian Insurance Company, 226 S. W., pp. 846-850:

> "That technical terms 'shall be understood according to their technical import,' on its face is mandatory. But it has been held to mean, and rightly so, that the context of the word may be regarded, and, if it shows other than a technical sense was intended the other meaning will be adopted."

And, further, Comley v. Board of Purchase and Supplies, 149 Atl., pp. 410-415:

> "The intent of the law-makers is the soul of the statute and a search for this intent we have held to be the guiding star of the court. It must prevail over the literal sense and the precise letter of the language of the statute."

And, further, in Cyrus v. State, 195 Indiana 346:

> "The objective to be kept in mind in construing the statute is to discover the intention of the legislature. The strict letter must yield to the obvious intent. While the intention of the legislature must be ascertained from the language used, yet, where the intention of the legislative body clearly appears from the language used, courts may restrict the general meaning of the words in order to accomplish the manifest purpose of the statute."

This Court in its recent decision recognized the difficulty of discussing tenure rights without involving contractual features in its discussion. Phelps v. The Board of Education of West New York; Askam v. Board of Education of W. New York, 57 Supreme Court Report 483. "The status of tenure teachers while in one sense contractual, is in essence dependent on a statute like that of the incumbent of a statutory office which the legislature at will may abolish."

The petitioner takes the position that the respondent is urging that the police power of the state justifies the abrogation of the contract. While it is true that the police power can be exercised to abrogate contract in certain instances, yet we do not believe that we need to stand on this proposition to prevail, and yet we submit that it is true exercise of the police or plenary power of the state in this case. Of course, we insist that there was no contract.

That the regulation of public schools is within the police power and plenary power; in fact, one of the first and foremost phases of public welfare is beyond dispute.

It is our contention that we could admit the legislative intent which the petitioner attempts to establish, that is, that the tenure right is a legislative contract, and still prevails. However, we contend that if it had been the intent of the Legislature to enact a law directing the school corporation to enter into a permanent contract creating a vested right therein so as to bind future legislation changing the state's policy of education, then said act would be invalid as an unwarranted and unlawful delegation of authority to the school corporation.

As held in Yard v. N. J., 95 U. S. 352, **354**, "The principal function of a legislative body is not to make contracts, but to make laws. * * *"

"Unless forbidden by some exceptions in a constitutional provision the same authority that can make a law can repeal it," and as held in a recent decision, Wilson v. School District of Philadelphia, 195 Atl., page 90—page 98: "The appointment of officers to guard a baseball park cannot be considered on the same plane as the determination of a teaching policy or system (apropos some of analogy in decisions cited by petitioner) * * *"

"The selection—mere matter of detail, * * * and not the surrender of an important power by the General Assembly," and also in the same decision on page 93: "It is a well-settled maxim that under our theory of the separation of powers of government, legislative, judicial and executive, the power of each branch must be preserved to it; the legislature cannot delegate its powers to an act law directly or indirectly to any body or governmental agency."

(Further on) "under a well balanced constitution, the legislature can no more delegate its proper function than can the judiciary. It is on the preservation of these lines of separate government that the liberties of the citizen depends."

"This principle, though not expressly written in our Constitution, embodies its basic strength if it is to endure as our fundamental or basic power necessary to government and cannot be delegated."

In the case of Rowekamp et al. v. Mercantile etc., 8 Circuit Court of Appeals, Federal R., Second Series, page 852, in which the Court said:

> "There are certain inherent powers in the government to enact laws to protect order, safety, health and general welfare of cities. This power frequently referred to as the police power has been said to be as

broad as the public welfare. It is an inherent attribute of sovereignty with which the state is endowed for the protection and general welfare of its citizens, and of which the state may not deprive itself. One state legislature cannot by an agreement bind itself or its successor not to exercise this attribute of sovereignty and all contracts whether made by the state itself, by its municipalities, or by individuals, are subject to be interfered with or otherwise effected by subsequent statutes enacted in the bona fide exercise of the police power, and such legislative acts are not within the contract clause of the constitution. Manigault v. Springs, 199 U. S. 473, 26 S. Ct. 127, 50 L. Ed. 294; Griffith v. Connecticut, 218 U. S. 563, 31 S. Ct. 132, 54 L. Ed. 1151; Hudson County Water Company v. McCarter, 209 U. S. 349, 28 S. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560; W. Chicago St. R. Company v. Illinois ex rel. City of Chicago, 201 U. S. 506, 26 S. Ct. 518, 50 L. Ed. 845; New Orleans Gas-Light Company v. Louisiana Light & Heat Producing & Mfg. Company, 115 U. S. 650, 6 S. Ct. 252, 29 L. Ed. 516; Texas & N. O. R. Company v. Miller, 221 U. S. 408, 31 S. Ct. 534, 55 L. Ed. 789; Douglas v. Kentucky, 168 U. S. 488, 18 S. Ct. 199, 42 L. Ed. 553; Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079; New Orleans Gas Light Company v. Drainage Commission of New Orleans, 197 U. S. 453, 25 S. Ct. 471, 49 L. Ed. 831; Butchers' Union Slaughter House & L. S. L. Company v. Crescent City Livestock & S. H. Co., 111 U. S. 746, 4 S. Ct. 652, 28 L. Ed. 585; Pennsylvania Hospital v. Philadelphia, 245 U. S., 20 S. Ct. 35, 62 L. Ed. 124; Knoxville Water Co. v. Knoxville, 189 U. S. 434, 23 S. Ct. 531, 47 L. Ed. 887.

"What the statutes subsequent to act No. 83 F. 1917 enacted in the exercise of the police power. The legislature of the state has power to determine primarily what measures are appropriate or needful for the protection of the public morals, public health, or

public safety, subject to judicial review. This act (Section 2, page 369) recites that: 'The object of this act is the protection of the people,' " etc.

As to the relationship of this Court in this controversy the Court said in Sauer v. New York, 206 U. S. 536-546, S. Ct. 686, page 546:

> "This court does not hold the relationship to the parties of a state court. It was the duty of that court to ascertain * * * the law of New York and its determination of that law is conclusive upon this court."

The power of the Supreme Court as expounded by Marshall (6 Wheaton 264, 5 L. Ed. 257 * * *) and precluded altogether the thought that * * *, the judicial included any power to correct any possible errors of the state courts in the determination of the state law.

The same law which declares easements, etc., defines qualities and limits them. Surely such questions must be for the final determination of the state court, "The right * * * in all states * * *, and the decisions have been conflicting, and often in the same state irreconciliable in principles. The courts have modified or overruled their own decisions and each state has fixed * * *, by legislation or judicial decisions, * * * in accord * * * with its own view of the law and public policy.

"This court has neither the right nor the duty to reconcile these conflicting decisions or to reduce the law of the various states to a uniform rule * * *."

The above case is followed on the same proposition in Fox River Company v. Railroad Company Commission, 274 U. S. 655.

The petitioner places great stress and relies largely upon the decision of this Court in the case if Coombs v.

Getz, 285 U. S. 434-441. However, upon examination of that decision, it will be seen that there is clearly a contractual relationship between the creditors of the bank of which the defending directors were held to be liable as surety for the default of the officers of the bank by operation of a statute which was repealed before the suit was brought on such liability. As the Court said, "Although the latter (contractual liability pursuant to law) derives it from the former, it immediately acquired an independent existence competent to survive the destruction of the provisions which gave it birth." In that case private parties made an undertaking with all of the necessary attributes of a contract and in view of the statute making the directors responsible in effect as sureties on the obligation of one of the contracting parties. Thus, as the Court indicated there was a contract made, including all of the provisions of the statute involved, yet the contract itself was independent and did not depend upon the statute for enforcement and did not lack mutuality of consideration to make it enforceable. Hence the repeal of a statute which authorizes a contract cannot affect a binding agreement made pursuant to the statute. In the case of bar, the rights depended entirely on the statute for their enforcibility and could not have stood alone as a contract without the support of the statute, for want of mutuality.

The petitioner insists that to treat the teachers' employment contracts as contracts from year to year defeats the purpose of the Teachers' Tenure Act, that is, to secure a teacher in permanent employment, the purpose which the petitioner avows. However, we insist that the purpose was to prevent Trustees discharging teachers with changes in politics of the Trustees or for personal reasons, thus disrupting the teaching staffs of the schools and

disorganizing the educational system of the state. However, without regard to the purpose of the act, the holding that under the Tenure Act the teacher's contract is a year-to-year contract in nowise defeats the purpose of the act, for as long as the Legislature believes that such a policy is a wise policy the act is retained and the contract is continued to be enforceable from year to year permanently, by virtue of the Tenure Statute, witness the fact that the Legislature of Indiana has retained tenure of city and town teachers, they being employed by the same form of contract as the township teacher, which contracts the Supreme Court of Indiana has determined to be contracts from year to year, and it is not urged that the city teachers have lost anything by such construction.

On the question of the want of mutuality of consideration the respondent is willing to admit that a binding contract with mutual consideration is not invalidated by reason of said contract being cancellable at the will of one of the parties. In that case there is mutual consideration independent of the provisions of cancellation. However, it seems to us that the primary lack of mutualities is that there is no consideration moving from the teacher to the school corporation in return for the tenure rights. What single requirement is there on the part of the teacher more than she is already bound to before she became a tenure teacher? The petitioner cites cases holding that skill and ability are as much a consideration for contract as property or money, but the teacher is required to have all the skill and ability that would be required, in any event, in the first place, to secure her teacher's license; and, second, to secure her employment the first five years. What does she offer beyond that? Nothing. Then the only provision affecting both parties is the provision preventing the school corporation from discharging the

teacher, but allowing the teacher to quit at will upon giving notice and without any limitations of reasons for quitting her employment. The only conceivable method by which such agreement would be binding would be if these provisions were incorporated as a part of an otherwise binding contract based on mutual consideration. That the Legislature intended the tenure rights and the provisions for cancellation of employment contracts to be separate and distinguished from such employment contracts is too obvious for argument, whether those rights should be called contractual or otherwise. In other words, the contention of the petitioner that by legislative enactment and judicial construction, that a contract accrued with the Legislature binding such Legislature and other agencies of the state to continue her employment contract. This argument distinguishes the permanent right of enforcibility of the contract from the employment contract itself.

That a contract will not be supported by agreement to do that thing or things or furnish that which the contracting parties already are bound to do and furnish will not be adequate consideration for a contract is supported by numerous authorities.

Musgrove v. D. E. Luther Pub. Co., 63 S. E. 52, **54**:

> "a 'past consideration' is one which has served its purpose in former transaction, and it is not sufficient to support a contractual guaranty. Where such a contract is created subsequent to the main contract it must be supported by a new consideration."

Witt v. Wilson, 160 S. W. 308, **310**;
Good v. Martin, 95 U. S. 90;
McNaught v. Fisher, 96 Fed. 168;
Favorite, Adm., v. Stidham, 84 Ind. Sup. 423, **426**;
Clod Felter v. Hulet, 72 Ind. Sup. 137, **145**;

Moyer et al. v. Brand, 102 Ind. Sup. 301, 305;
Bridges, Adm., v. Blake et al., 106 Ind. Sup. 332, 333.

On pages 38 and 39 of petitioner's brief the argument waxes dramatic when he infers that the construction placed on that statute by the Indiana Supreme Court in effect dishonors the state by permitting the Legislature to mislead the teacher into believing that she had a contract when she had no contract. It is elementary that people entering into contracts are bound to know the law affecting such contracts and the legal import of the contract executed. I have never heard it proposed that a contract should be construed contrary to the law of the land because one of the contracting parties misunderstood, or might have misunderstood, the terms of that contract. An attempted contract or agreement could not be enlarged upon by the misunderstanding of one of the parties as to the legal effect of the provisions thereof. Assuming that the teacher had all of the qualifications necessary to continue to teach for five years and had continued to progress, conduct herself suitably to her position and was a successful teacher, no harm should come to her by reason of a repeal of the Tenure Statute. The repeal of that statute did not direct nor could it be presumed to have caused the township school corporation to cancel any of the employment contracts in force at the time of the repeal of such act.

For a very thorough discussion of the relative power of the Legislature in the field of regulatory police power and the decisions of the courts thereon, we believe the following case is worth consideration and we further on copy the pertinent parts thereof:

S. H. Kress & Co. v. Johnson, 16 C. C. A. 32.

The rest of petitioner's cases and arguments are based on cases where there was an attempted interference by the state of rights that were clearly property rights or contractual rights. The majority of the opinions cited were also involved in the attempted interference with private contracts and property in private affairs and not in the regulation of a governmental agency as the schools of the state and in the field that is clearly within the functions of the government, namely, the regulation of the educational system of the state.

The case of Hall v. Wisconsin, 103 U. S. 5, is the most nearly applicable Supreme Court decision. However, in that case we again have a decision wherein a binding contract not lacking in mutualities was executed and performance begun before the repeal of the statute authorizing the contract. In this case as in Coombs v. Getz, a binding contract was executed pursuant to the authority of the statute authorizing employment of the engineers, and said contract became independent of the legislative authority from which it sprung and dependent on the consideration in the contract alone for its enforcement and was no longer dependent upon the statute for enforcement and thus, of course, the repeal of the statute from which it was born would have no effect on the contract.

Going into the question of the exercise of the police power of the state and the degree of injury to the public to authorize its exercise, I wish to call the Court's attention to the case of S. H. Kress & Co. v. Johnson, 16 C. C. A. 32:

> "While there was a sharp conflict in the opinion of the experts in the field of health, hygiene, and sanitation, there is substantial evidence that the require-

ment of a separate room will tend to promote and protect the public health. Had the same evidence been before the legislature it could have found either way on the issue and its finding would have been supported by substantial evidence.

"Furthermore, despite the opinions of experts to the contrary, we regard the requirement, that restaurants as defined in the statute be conducted in a room separate from the room or rooms in which other departments of a business establishment are conducted has a reasonable relation to the public health. Such a room can more readily be kept clean and sanitary; it can be kept more free from dust, germs, and flies; and a less number of persons will enter the room than will enter the general business establishment. There will be less of sneezing and coughing therein which all the experts admit may contaminate food. Persons entering a dining room are more apt to be careful of the welfare of others than they would be in a general business establishment.

"Such being the fact what is the province and duty of the court in the premises?

"In the Standard Oil Company v. Marysville, 279 U. S. 582, 49 S. Ct. 430, 431, 73 L. Ed. 856, the court said:

> " 'We may not rest in the balances of judicial review the weight and sufficiency of the fact to sustain the conclusion of the legislative body, nor may we set aside the ordinance because compliance would be burdensome.'

"In Bordens Farm Products Company v. Ten Eyck, 297 U. S. 251, 56 S. Ct. 453-456, 80 L. Ed. 669, the court said:

> " 'In the light of the facts found, the legislature might reasonably have thought trade conditions existed justifying the fixing of the * * *.

Judicial inquiry does not concern itself with the accuracy of the legislative finding but only with the question whether the same lack any reasonable basis as to be arbitrary.'

"In Sproles v. Binford, 286 U. S. 374, 52 S. Ct. 581, 585, 76 L. Ed. 1167, the court said:

" 'When the **subject lies within the police power of the State**, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment.'

"In Radice, New York, 264 U. S. 292, 44 S. Ct. 325, 326, 68 L. Ed. 690, the court said:

" 'Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts established be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect to it against the opinion of the lawmakers. The state legislature here determined that night employment of the character specified was sufficiently detrimental to the health and welfare of women engaging in it to justify its suppression; and, since we are unable to say that the findings are clearly unfounded, we are precluded from reviewing the legislative determination.'

"In Price v. Illinois, 238 U. S. 446, 35 S. Ct. 892, 894, 59 L. Ed. 1400, the validity of a statute prohibiting the sale of food preservatives containing boric acid was challenged. The court said:

" 'The contention of the plaintiff in error could be granted only if it appeared that by a consensus of opinion the preservative was unquestionably harmless with respect to its contemplated uses;

that is, that it indubitably must be classed as a wholesome article of commerce so innocuous in its designed use and so related in any way to any possible danger to the public health that the enactment must be considered as a merely arbitrary interference with the property and liberty of the citizen. It is plainly not enough that the subject should be regarded as debatable. If it be debatable, the legislature is entitled to its own judgment and that judgment is not to be superseded by the verdict of a jury upon the issue which the legislature has decided.'

"See, also, Bayside Fish Flour Company v. Gentry, 297 U. S. 422, 56 S. Ct. 513, 80 L. Ed. 772. Counsel for plaintiff strongly rely upon Borden's Farm Products Company v. Baldwin, 293 U. S. 194, 55 S. Ct. 187, 79 L. Ed. 281. While that case fully justifies the hearing of evidence in the instant case, the opinion that it is contrary to the principles above stated or which would justify us by weighing conflicting evidence on the issue decided by the legislature. Our sole inquiry is whether a rational factual basis for the legislative requirement is so wanting as to make it unreasonable and purely arbitrary.

"The burden of establishing the want of such a factual basis and that the statute is unreasonable and arbitrary is on the plaintiffs. Bordens Farm Products Company v. Baldwin, 293 U. S. 194, 209, 55 S. Ct. 187, 79 L. Ed. 281; Powell v. Pennsylvania, 127 U. S. 678, 684, 8 S. Ct. 992, 1257, 32 L. Ed. 253; Weaver v. Palmer Brothers Company, 270 U. S. 402, 410, 46 S. Ct. 320, 70 L. Ed. 654; Metropolitan Casualty Insurance Company v. Brownell, 294 U. S. 580, 584, 55 S. Ct. 538, 79 L. Ed. 1070. Plaintiffs have not met that burden. The most that can be said is that evidence leaves the question whether the provisions of the statute here challenged will promote and protect the public health,

fairly debatable. Such being the factual decision we cannot substitute our judgment for that of the legislature and say that the statute is unreasonable and arbitrary.

"Counsel for plaintiffs asserts the exceptions written into the act resulted in unreasonable and arbitrary classifications.

"When the classification made by the legislature is challenged, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification has the burden of showing by resort to common knowledge or other matters which may be judicially noticed or to other legitimate proof that the action is arbitrary.

"Bordens Farm Products Company v. Baldwin, 293 U. S. 194, 209, 55 S. Ct. 187, 79 L. Ed. 281; Race v. Van Deeman and Lewis Company, 240 U. S. 342, 357, 36 S. Ct. 370; 60 L. Ed. 679, L. R. A. 1917 A 421, Ann. Cas. 1917 B 455.

"But here again the scope of the judicial review is limited. If the evidence or conclusions drawn therefrom, leaves it fairly debatable as to whether there is a reasonable basis for the classification, the courts may not override the legislative determination. To warrant the court in holding that classifications offends against the Equal Protection Clause, the proof must show that the classification is wholly without any rational basis and is essentially arbitrary.

"Bordens Farm Products Company v. Baldwin, supra; Whitney v. California, 274 U. S. 357, 369, 47 S. Ct. 641, 71 L. Ed. 1095. Counsel say the exception as to soft drinks, ice cream or ices, and confections includes milk, and that of all foods, is most susceptible to contamination. But milk is kept in closed containers and is usually served directly therefrom to the customer at the counter or table. The place where

greatest care must be used is at the dairy and up to the point where it is sealed in the container. Thereafter it is reasonably safe against contamination and is not likely to become unwholesome, if the container is clean when filled, is kept sealed and proper temperature is maintained.

"It is urged that hotels, boarding houses and railroad dining cars may not be excluded by any rational basis of classifications. None of these engages in the sale of general merchandise and normally and customarily maintain separate dining rooms where only articles of food, drink, and tobaccos are sold.

"Furthermore, a statute does not violate the Equal Protection Clause merely because not all embracing. The legislature is free to recognize degrees of harm and may confine its restrictions to those classes of cases where the need is deemed to be clearest.

"Whitney v. California, 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095; People of State of New York ex rel.; Bryant v. Zimmerman, 278 U. S. 63, 73, 74, 49 S. Ct. 61, 73 L. Ed. 184, 62 A. L. R. 785; Bayside Fish Flour Company v. Gentry, 297 U. S. 422, 56 S. Ct. 513, 516, 80 L. Ed. 722.

"We are of the opinion that plaintiffs failed to establish that the classifications adverted to are without rational basis and essentially arbitrary.

"Action of the legislature under police power and within the range of legislative discretion cannot be set aside because it is burdensome.

"Sproles v. Binford, 286 U. S. 374, 389, 52 S. Ct. 581, 76 L. Ed. 1167; Standard Oil Company v. Marysville, 279 U. S. 582, 586, 49 S. Ct. 430, 73 L. Ed. 856.

"With wisdom and expediency of the statute we are not concerned. Those are questions exclusively for legislative determination."

In conclusion let us see what the United States Supreme Court has said of the matter directly in issue. In the case

of Phelps v. Board of Education of W. New York, 57 Supreme Court Report 483, this Court said,

> "the position of the appellant is that by virtue of the Act of 1909, three years of service under contract confers upon an employee of a school district a contractual status indefinite in duration which the Legislature is powerless to alter or authorize the Board of Education to alter.
>
> "The Supreme Court holds that the Act of 1909 'establish a legislative status for teachers, but we fail to see that it established a contractual one that the Legislature may not modify. * * * the Statute of Tenure Teachers, while in one sense perhaps contractual is in essence dependent on a statute, like that of an incumbent of a statutory office which the Legislature at will may abolish, or whose emolument it may change.' "

And, further on, "here those courts have concurred in holding that the Act of 1909 did not amount to a legislative contract with the teachers of the state, and did not become a term of the contract entered into with employees by the Board of Education. Unless these views are palpably erroneous we should accept them." And, "we find nothing in the record to indicate that the board was bound by the contract with the teacher for more than the current year. The employee assumed no binding obligation to remain in service beyond that term. Although the Act of 1909 prohibited the board, a creature of the state, from reducing the teacher's salary or discharging him without cause, we agree with the courts below that this was but a regulation of the contract of the board and not a term of a continuing contract of indefinite duration with the individual teacher." And in the first part of said decision the Court said, "the people of New

Jersey have ordained by their constitution that the Legislature 'shall provide for the maintenance and support of a thorough and efficient system of free public schools.'"

This decision could be taken over and verbatim applied to the law and the facts in this case. As set out in Appendix C, Article 8, Section 1, of the Constitution of Indiana, provided for the maintenance of free public schools and also contained therein the statement that schools are "essential to the preservation of free government"; and said constitutional provisions required that such school system be provided for and **regulated by law.** This is fundamentally the same as the provisions of the New Jersey Constitution. The contention of the petitioners in that case is exactly the same as the argument of the petitioner in this case and based upon a Tenure Statute which is essentially the same in all fundamentals. In New Jersey there was an employment contract annually for three years and a provision that after that time the employing authorities could not discharge except for statutory causes. And the Court said in the New Jersey case, "we find nothing in the record to indicate that the board was bound by contract with the teacher more than the current year." In the Indiana law and practice we find clear indications of the annual basis of contracts with teachers as to their employment under the Indiana statute using the exact words of this Court's decision, "the employee assumes no binding obligation to remain in the service beyond that term." And the statute in Indiana clearly indicated that lack of obligation by providing the method by which the teacher could quit her employment at the end of any one year. And our State Supreme Court used almost the same language that the United States Supreme Court uses in the above decision when it held that the Tenure Act was for the purpose of "limiting the power

of the local school officers to employ one in the place of a tenure teacher and required that tenure teachers be employed unless there was a necessary reduction in the number of teachers," and as pointed out in the original opinion, "The Legislature enacting school laws exercises one of the functions of sovereignty. The right to control public policy, in respect to the management and operation of school, cannot be contracted away by one legislature so as to fix a permanent public policy, unchangeable by succeeding legislatures." If there is still any question about tenure rights under the Indiana law being a regulation of educational policy rather than a contractual regulation, let us examine the most recent decision of this Court in Dodge et al. v. Board of Education of City of Chicago et al., U. S. Supreme Court Reports, Vol. 58, page 98; in that case there was some basis for consideration in that under the original tenure law of Illinois the funds accrued from teachers' contributions and gifts or legacies. And, also there was a direct expression in the statute directing the school board to pay a specific annual pension and a fixed sum and required the teacher to hold herself in readiness for certain services, which also could be a basis of consideration running from the teacher for the payment of such pensions.

In that case it is said "that the parties agree that the state may enter into contracts with citizens, the obligation of which the Legislature cannot impair by subsequent enactment. And they agree that legislation declaring a **policy** or regulation as subject to repeal." The respondent here agrees with both of these propositions. This Court says in the above decision that, "In determining whether a law tenders a contract to a citizen, it is of first importance to examine the language of the statute. If it provides for a written execution of a contract on behalf

of the state, the case of an obligation binding upon the state is clear." The respondent takes solace in that statement. However, as previously clearly shown, the Indiana statute does not provide for the execution of a written contract on behalf of the state binding the state to employ the teacher indefinitely. And we think, as previously pointed out in our argument, that said contract, if it were to be executed on behalf of the state, would fail for the want of mutuality. And the Indiana Tenure Act is exactly what the Court referred to when it said, "This is true also of an act fixing the term or tenure of a public officer or **an employee of a state agency**. The presumption is that such a law is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the Legislature shall ordain otherwise."

These two decisions are more eloquent and decisive of the case at bar and all of the foregoing argument in respondent's brief. As was said in this last decision, "He who asserts the creation of a contract with the state in such a case has the burden of overcoming this presumption (the presumption stated by this Court in the last quotation above)." Thus, if there were some doubt as to the decision under the Indiana Tenure Law that doubt must be resolved as against the contractual construction of the statute, as urged by the petitioner, they being required to show it to the contrary beyond doubt to overcome said presumption of noncontractual construction.

Finally, the respondent contends that the Legislature of Indiana, in enacting the 1927 Teachers' Tenure Act of Indiana, did not, and did not intend to, create a contractual tenure with the teacher employed by the respondent subject to said Tenure Act, but was intended, and was, only a limitation upon the employment, re-employment and discharge of the petitioner. It further contended that

the Legislature could not have enacted a valid statute alienating its sovereignty by contracting with teachers in limitation of that sovereignty or plenary power so as to bind future legislatures. And that, aside from those two propositions, it's our belief that the police power would authorize legislation affecting contracts concerning educational system of the state, said contracts being made pursuant to police power of the state. Therefore, the Indiana Supreme Court should be upheld and their decision affirmed.

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## APPENDIX A.

January 24, 1933. (Record.)

### SENATE BILL NO. 34.

A Bill for an Act to repeal an act entitled "An act defining teachers and permanent teachers, providing for their employment and release, and defining, and providing for the making and cancelling of, indefinite contracts," approved March 8, 1937, and all acts amendatory thereof and supplemental thereto.

Section 1. Be it enacted by the General Assembly of the State of Indiana, That an act entitled "An act defining teachers and permanent teachers, providing for their employment and release, and defining, and providing for the making and cancelling of, indefinite contracts," approved March 8, 1937, and all acts amendatory thereof and supplemental thereto, by, and the same are hereby repealed.

**Senate Motion.**

Mr. President:

I move further consideration of Senate Bill No. 34 be indefinitely postponed.

Druley.

Note: Motion defeated, 35 to 11. January 24, 1933.

Senate Journal, date of January 30, 1933, Vol. I, page 270 ff.

**Senate Motion.**

Senators Egan and Druley offered the following motion:

Mr. President:

I move to amend Senate Bill No. 34 by striking out all of the said bill after the enacting clause and substituting the following in lieu thereof. Reference being had to the printed bill.

**Amendment to Senate Bill 34.**

(Schricker.)

Section 1. **Be It Enacted by the General Assembly of the State of Indiana,** That section 1 of the above entitled act be amended to read as follows: Sec. 1. That any person who has served or who shall serve under contract as a teacher in any school **city** corporation **or in any school town corporation or in any joint school corporation** in the State of Indiana for five or more successive years, and who shall **at any time** hereafter enter into a teacher's contract for further service with such corporation, shall thereupon become a permanent teacher of such school corporation. The term "teacher" as used in this section shall mean and include licensed public school teachers, supervisors and principals of all **such** school corporations, and licensed assistant superintendents and superintendents of **such** school **corporations.** Upon the expiration of any contract between such school corporation and a permanent teacher, such contract shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract. Such an indefinite contract shall remain in force unless succeeded by a new contract signed by both parties

or unless it shall be cancelled as provided in section 2 of this act; Provided, That teachers' contracts shall provide for the annual determination of the date of beginning and length of school terms by the school corporation: and, Provided further, That teachers' contracts may contain provisions for the fixing of the amount of annual compensation from year to year by a salary schedule adopted by the school corporation and such schedule shall be deemed to be a part of such contract: and, Provided further, That such schedule may be changed by such school corporation on or before May first of any year, such changes to become effective at the beginning of the following school year: Provided, That all teachers affected by such changes shall be furnished with printed copies of such changed schedule within thirty days after its adoption: **and, Provided further, That teachers contracts shall be uniform and of the form and wording as prescribed by the state superintendent of public instruction.**

Sec. 2. That section 2 of the above entitled act be amended to read as follows: Sec. 2. Any indefinite contract with a permanent teacher as defined in Section 1 of this act may be cancelled only in the following manner: Not less than thirty days nor more than forty days before the consideration by any **such** school corporation of the cancellation of any such contract, such teacher shall be notified in writing of the exact date, time and place where such consideration is to take place; and such teacher shall be furnished a written statement of the reasons for such consideration, within five days after any written request for such statement; and such teacher shall, upon written request for a hearing, filed within fifteen days after the receipt by said teacher of notice of date, time and place of such consideration, be given such a hearing before the

school board **of such school corporation**; such hearing shall be held not less than five days after such request is filed and such teacher shall be given not less than five days notice of the time and place of such hearing. Such teacher, at the hearing, shall have a right to a full statement of the reasons for the proposed cancellation of such contract, and shall have a right to be heard, to present the testimony of witnesses and other evidence bearing upon the reasons for the proposed cancellation of such contract. No such contract shall be cancelled until the date set for the consideration of the cancellation of such contract; nor until after a hearing is held, if such hearing is requested by such teacher; nor until, in the case of teachers, supervisors and principals, the city or town **or joint school** superintendent shall have given the school corporation his recommendation thereon, and it shall be the duty of such superintendent to present such recommendations upon five days written notice to him by such school corporation. Nothing contained in this section shall prevent the suspension from duty of any teacher pending a decision on the cancellation of such teacher's contract. Cancellation of an indefinite contract of a permanent teacher may be made for incompetency, insubordination (which shall be deemed to mean a willful refusal to obey the school laws of this state or reasonable rules prescribed for the government of the public schools of such corporation), neglect of duty, immorality, justifiable decrease in the number of teaching positions or other good and just cause, but may not be made for political or personal reasons: Provided, That when the cause of cancellation of an indefinite contract is immorality or insubordination, as defined in this act, such cancellation shall go into effect at once; and, Provided further, That when the cause of cancellation of an indefinite contract is not immorality or insubordination, as defined in

this act, such cancellation shall go into effect at the end of the school term following such cancellation. The school board of any **such school corporation**, by a majority vote, evidenced by a signed statement in the minutes of the board, may cancel an indefinite contract with a teacher after compliance with the provisions of this section: Provided, That the decision of the school board shall be final.

Sec. 3. That section 3 of the above entitled act be amended to read as follows: Sec. 3. No teacher shall be appointed to any **such** school corporation in Indiana, and no teacher shall become a permanent teacher in any such school corporation, until the **school** superintendent shall have made a report upon such teacher's preparation, experience, and license, and it shall be the duty of every such superintendent, within ten days after request, to make such report upon any person whom the school corporation is considering as an applicant: Provided, That nothing contained in this section shall be deemed to prevent the granting to any superintendent of additional authority in the selection and employment of teachers either by law or by the rules or regulations of any **such** school corporation.

Sec. 4. That section five (5) of the above entitled act be amended to read as follows: Sec. 5. Any such school corporation, upon written request, may grant leaves of absence, for periods not exceeding one year, to any permanent teacher for study or professional improvement or because of physical disability or sickness, subject to such rules and regulations governing leaves of absence as may be adopted by such corporation: Provided, That without written request any **such** school corporation may place a permanent teacher on leave of absence for periods of not exceeding one year because of physical or other disability

or sickness: Provided, That such teacher shall have a right to a hearing on such unrequested leave of absence in accordance with the provisions for hearings contained in section 2 of this act.

Sec. 5. That section 6 of the above entitled act be amended to read as follows: Sec. 6. **Nothing contained in this act shall be so construed as to affect the contract or the legal status of any teacher who, at the time of the passage of this act, has become a permanent teacher, under the terms of such contract, as he would have done if this act had not been passed.** This act shall be construed as supplementary to an act of the General Assembly, page 195, Acts 1921, entitled "An Act concerning teachers' contracts and providing for the repeal of conflicting laws."

(Amends Burns' Sec. 6967.1-6967.3; 6967.5.)

Egan and Druley, Senators.

Question is the adoption of the amendment.

The Egan and Druley amendment was adopted.

House Journal, Vol. II, date Feb. 24, 1933, Page 1119.

**Special Order of Business.**

Engrossed Senate Bill No. 34 being:

A Bill for an Act concerning Teachers and providing employment.

Representative Dill offered the following motion with amendment:

Mr. Speaker:

I move that Re-Engrossed Senate Bill No. 34 be amended as follows:

By striking out all of said re-engrossed Senate Bill following the enacting clause in lines 1 and 2 of Section 1, and inserting in lieu thereof the following:

That Section 1 of the above entitled act be amended to read as follows: Sec. 1. * * *

(This section is the same as Section 1 of the 1933 act.)

Sec. 2. That Section 2 of the above entitled act be amended to read as follows: Sec. 2. * * *

(This section is the same as Section 2 of the 1933 act.)

Sec. 3. That Section 3 of the above entitled act be amended to read as follows: Sec. 3. * * *

(This section is the same as Section 3 of the 1933 act.)

Sec. 4. That Section 5 of the above entitled act be amended to read as follows: Sec. 5. * * *

(This section is the same as Section 5 of the 1933 act.)

Sec. 5. That Section 6 of the above entitled act be amended to read as follows: Sec. 6. This act shall be construed as supplementary to an act of the General Assembly, page 195, Acts 1921, entitled "An act concerning teachers' contracts and providing for the repeal of conflicting laws."

Note: (This is the same as Section 6 of the 1933 act.)

And when so amended, said Bill do pass.

Dill.

The motion prevailed.

The bill with the accepted amendments ordered to engrossment.

House Journal, Vol. II, date Feb. 25, page 1140.

**Bills on Third Reading.**

Engrossed Senate Bill No. 34, being: A Bill for an act concerning teachers and providing employment.

The bill was read a third time in full.

The speaker stated that the question is, Shall the Bill Pass?

Those voting in the affirmative were:

Total number, 65.

Those voting in the negative were:

Total number, 18.

The bill was declared passed.

Senate Journal, Vol. II, date Feb. 27, 1933, page 1395.

**Senate Motion.**

Senator Schricker offered the following motion:

Mr. President:

I move that the Senate do not concur in the House amendments made to Senate Bill No. 34 and that a conference committee be appointed to confer with a like committee from the House on the questions in disagreement.

Which motion prevailed. (Senators Schricker and Druley were named by the President of the Senate to confer.)

House Journal, Vol. II, date Feb. 27, page 1185.

**Message to the House.**

Mr. Speaker:

I am directed by the Senate to inform the House that

the Senate has not concurred in House amendments to Engrossed Senate Bill No. 34 and that the President of the Senate has appointed Senators Schricker and Druley a conference committee to meet and confer with a like committee of the House on said Bill, and to report thereon.

Dick Heller,
Secretary of the Senate.

The Speaker appoints Representatives Dill and Wickersham.

House Journal, Vol. II, date of Feb. 27, pages 1201-1202.

**Conference Committee Report.**

Mr. Speaker:

Your Conference Committee, appointed to confer with a like committee from the Senate upon Engrossed House Amendments to Engrossed Senate Bill No. 34, respectfully reports that said two committees have conferred and agreed as follows, to wit: That the Senate do now concur in all House amendments made to said Engrossed Senate Bill No. 34.

Druley,
Schricker,
Wickersham,
Dill.

The House concurred in the report.

House Journal, Vol. II, date of Feb. 27, page 1209.

**Message From the Senate.**

Mr. Speaker:

I am directed by the Senate to inform the House that the Senate has concurred in conference committee report on House Bill No. 314 and Senate Bill No. 34.

Dick Heller,
Secretary of the Senate.

Bill as amended passed in the Senate and signed by the President on March 1, 1933, returned to House and signed by Speaker March 1, 1933, and delivered to Governor March 1, 1933. Held by Governor and delivered by him to Secretary of State on March 6, 1933, without his signature. Bill became law without signature of Executive.

## APPENDIX B.

### Indiana Teachers' Tenure Act 1933—Indiana Acts 1933, p. 716.

1934 Baldwin's Indiana Statutes 6003-6008.

(Bold-face type—additions to 1927 act. Small type in brackets—deletions from 1927 act.)

**Teachers—Amendment—When to Become Permanent—Contracts — School Terms — Compensation — Salary Schedule—Uniformity of Contracts.**

Section 1. Be it enacted by the general assembly of the State of Indiana, That Section 1 of the above entitled act be amended to read as follows: Section 1. That any person who has served or who shall serve under contract as a teacher in any (school corporation) **(school city corporation or in any school town corporation)** in the State of Indiana for five or more consecutive years, and who shall at any time hereafter enter into a teachers' contract for further service with such corporation, shall thereupon become a permanent teacher of such school corporation. The term "teacher" as used in this section shall mean and include licensed public school teachers, supervisors and principals of all such public school corporations, and licensed assistant superintendents, and superintendents of such school corporations. Upon the expiration of any contract between such school corporation and a permanent teacher, such contract shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract. Such an indefinite contract shall remain in force

until such permanent teacher shall have reached the age of sixty-six years unless succeeded by a new contract signed by both parties or unless it shall be cancelled as provided in section 2 of this act; Provided, That teachers' contracts shall provide for the annual determination of the date of beginning and length of school terms by the school corporation; and, Provided further, That teachers' contracts may contain provisions for the fixing of the amount of annual compensation from year to year by a salary schedule adopted by the school corporation and such schedule shall be deemed to be a part of such contract; Provided further, That such schedule may be changed by such school corporation on or before May first of any year, such changes to become effective at the beginning of the following school year; Provided, That all teachers affected by such changes shall be furnished with printed copies of such changed schedule within thirty days after its adoption; **(and, Provided further, that teachers ['] contracts shall be uniform and of the form and wording as prescribed by the state superintendent of public instruction.)**

**Teachers—Indefinite Contract—Amendment—Cancellation —Time and Place of Hearing—Notice to Teacher—Statement of Reasons—Suspension of Teacher—Grounds for Cancellation—Board—Decision—Final.**

Sec. 2. That section 2 of the above entitled act be amended to read as follows: Sec. 2. Any indefinite contract with a permanent teacher as defined in section 1 of this act may be cancelled only in the following manner: Not less than thirty days or more than forty days before the consideration by any such school corporation of the cancellation of any such contract, such teacher shall be notified in writing of the exact date, time when and place where such consideration is to take place; and such teacher

shall be furnished a written statement of the reasons for such consideration within five days after any written request for such statement; and such teacher shall, upon written request for a hearing, filed within fifteen days after the receipts by said teacher of notice of date, time and place of such consideration, be given such a hearing before the school board (in the case of cities and towns, and before the township trustee, in the case of Townships;) of such school corporation; such hearing shall be held not less than five days after such request is filed and such teacher shall be given not less than five days' notice of the time and place of hearing. Such teacher, at the hearing shall have a right to a full statement of the reasons for the proposed cancellation of such contract, and shall have a right to be heard, to present the testimony, witnesses and other evidence bearing upon reasons for the proposed cancellation of such contract. No such contract shall be cancelled until the date set for consideration of the cancellation of such contract; nor until after a hearing is held if such hearing is requested by said teacher; nor until, in the case of teachers, supervisors, and principals, the city or town superintendent shall have given the school corporation his recommendations thereon, and it shall be the duty of such superintendent to present such recommendations upon five days' written notice to him by such school corporation. Nothing contained in this section shall prevent the suspension from duty of any teacher pending a decision on the cancellation of **such teacher's contract.** Cancellation of an indefinite contract of a permanent teacher may be made for incompetency, insubordination (which shall be deemed to mean a wilful refusal to obey the school laws of this state or reasonable rules prescribed for the government of the public schools of such corporation), neglect of duty, immorality, justifiable decrease in the

number of teaching positions or other good and just cause but may not be made for political or personal reasons; Provided, That when the cause of cancellation of an indefinite contract is immorality or insubordination, as defined in this act, such cancellation shall go into effect at once; and, Provided further, That when the cause of cancellation of an indefinite contract is not immorality or insubordination as defined in this act, such cancellation shall go into effect at the end of the school term following such cancellation. The school board of any such school corporation, by a majority vote, evidenced by a signed statement in the minutes of the board, may cancel an indefinite contract with a teacher after compliance with the provisions of this section; Provided, That the decision of the school board shall be final.

**Teachers—Condition Precedent to Appointment and/or Making Permanent—Amendment—Superintendent—Statement—Contents—Proviso—Act Construed.**

Sec. 3. That section 3 of the above entitled act be amended to read as follows: Sec. 3. No teacher shall be appointed by any such school corporation in Indiana, and no teacher shall become a permanent teacher in any such school corporation, until the school superintendent shall have made a report upon such teacher's preparation, experience, and license, and it shall be the duty of every such superintendent, within ten days after request, to make such report upon any person whom the school corporation is considering as an applicant; Provided, That nothing contained in this section shall be deemed to prevent the granting to any superintendent of **additional authority** in the selection and employment of teachers either **by law** or by the **rules** or **regulations** of any such school corporation.

**Leaves of Absence—Periods of—Reasons for—Amendment—School Corporation—Proviso—Right to Hearing.**

Sec. 4. That section 5 of the above entitled act be amended to read as follows: Sec. 5. Any such school corporation, upon written request, may grant leave of absence, for periods not exceeding one year, to any permanent teacher for study or professional improvement or because of physical disability or sickness, subject to such rules and regulations governing leave of absence as may be adopted by such corporation; Provided, That without written request any such school corporation may place a permanent teacher on leave of absence for periods of not exceeding one year because of physical or other disability or sickness; Provided, That such teacher shall have a right to a hearing on such unrequested leave of absence in accordance with the provisions for hearings contained in section 2 of this act.

**Amendment—Act Construed.**

Sec. 5. That section 6 of the above entitled act be amended to read as follows: Sec. 6. This act shall be construed as supplementary to an act of the general assembly, page 195, Acts 1921, entitled "An act concerning teachers' contracts and providing for the repeal of conflicting laws."

## APPENDIX C.

### The Constitution of the State of Indiana, Article 8, Section 1.

Sec. 1. Common Schools.—Knowledge and learning, generally diffused throughout a community, being essential to the preservation of free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific and agricultural improvement; and to provide, by LAW, for a general and uniform system of Common Schools, wherein tuition shall be without charge, equally open to all.

## APPENDIX D.

### Baldwin's Indiana Statutes 1934, Section 5994.

Section 5994. Employment of teachers.—That after the passage of this act it shall be unlawful for any township trustee to contract with any teacher to teach in any common school, if the actual term of service of such teacher under such contract does not begin before the expiration of the term of office of such trustee. Every contract made in violation of the provisions of this section shall, as to the township represented by such trustee, and the school fund thereunto belonging, be absolutely void, but such trustee shall be personally liable to such teacher for all services rendered under such contract and for all damages which he may sustain by reason thereof (1893, p. 34, Sec. 1).

## APPENDIX E.

### Baldwin's Indiana Statutes, 1934, Section 5995.

Section 5995. Written contracts with teachers.—All contracts hereafter made by and between teachers and school corporations of the State of Indiana shall be in writing, signed by the parties to be charged thereby, and no action shall be brought upon any contract not made in conformity to the provisions of this act (1899, p. 173, Sec. 1).

## APPENDIX F.

### Baldwin's Indiana Statutes 1934, Section 5998.

Section 5998. Daily wage of teachers—Minimum per school year.—The daily wages of teachers for teaching in the public schools of the state shall not be less in the case of beginning teachers, than an amount determined by multiplying four and one-fourth cents by the general average given such teacher on his highest grade of license at the time of contracting. For teachers having had a successful experience for one school year of not less than six months, the daily wages shall be not less than an amount determined by multiplying four and three-fourths cents by the general average given such teacher on his highest grade of license at the time of contracting. For teachers having had a successful experience of three or more school years of not less than six months each, the daily wages shall be not less than an amount determined by multiplying five and one-half cents by the general average given such teacher on his highest grade of license at the time of contracting. For teachers having had a successful experience of five or more school years of not less than six months each, the daily wages shall be not less than an amount determined by multiplying six cents by the general average given such teacher on his highest grade of license at the time of contracting. All teachers now exempt from examination shall be paid, as daily wages for teaching in the public schools, not less than an amount determined by multiplying six and one-half cents by the general average of scholarship and success given such teacher: Provided, That the grade of scholarship accounted in each case be

that given at the teacher's last examination, and that the grade of success accounted be that of the teacher's term last preceding the date of contract: And provided further, That two per cent shall be scholarship and success for attending the county institute the full number of days, and that said two per cent shall be added to the average scholarship of beginning teachers: Provided further, That the minimum paid to any teacher in the common schools of this state shall not be less than $800 per school year (1920, p. 194, Sec. 1; 1919, p. 768, Sec. 1; 1913, p. 104, Sec. 1; 1911, p. 131, Sec. 1; 1907, p. 146, Sec. 1).

## APPENDIX G.

### Baldwin's Indiana Statutes 1934, Section 5999.

Section 5999. Payment at less rate—Penalty.—If any school officer shall pay to any teacher for school services at a rate less than that fixed by this act, he shall be fined in any amount not exceeding $100.00 and shall be liable in a civil action for wages to such teacher at the rate provided in this act, which may be recovered by such teacher, together with an attorney's fee of $25.00, in any court of justice of competent jurisdiction (1907, p. 146, Sec. 3).

## APPENDIX H.

### The New Jersey Act (as Quoted in Phelps v. Board of Education of Town of West New York, 57 Sup. Ct. Rep. 483).

Section 1 (4 N. J. Com. St. 1910). The service of all teachers, principals, supervising principals of the public schools in any school district of this state shall be during good behavior and efficiency, after the expiration of a period of employment of three consecutive years in that district, unless a shorter period is fixed by the employing board; . . . No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her . . . and after the charge shall have been examined into and found true in fact by said Board of Education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing . . .

# ERRATUM

## FOR RESPONDENT'S BRIEF

(Filed January 4, 1938

PAGE IV INDEX—Hall et al., State Board of Assessment and Review; should read; Hale et al., State Board of Assessment and Review and is cited on page 8 of brief only.

PAGE IV INDEX—16 C. C. A 32 should read; 16 Fed. Sup. page 5.

APPENDIX B page 46.

"Until such permanent teacher shall have reached the age of sixty-six years" should be in bold face type indicating that those words are added in the 1933 Teachers Tenure Act and were not found in the 1927 Act.

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937.

No. 256

STATE OF INDIANA on the Relation of
DOROTHY ANDERSON,
Petitioner,
vs.
HARRY BRAND, Trustee of CHESTER SCHOOL
TOWNSHIP OF WABASH COUNTY, INDIANA

## RESPONDENT'S BRIEF,
## SUPPLEMENTARY TO ARGUMENT

### SUPPLEMENTAL ARGUMENT

Without restating the case and the issues, I wish to present to the court a very short and concise brief of the questions raised on argument and to further clarify the position of the respondent in this case.

It is our contention that in effect the state of Indiana through its legislature said to the teachers, we think it wise in order to better the educational system of Indiana to encourage teachers to look more favorably on their profession and to encourage new teachers to enter such a profession by providing stability and security of employemnt of teachers. Therefore, in effect, said, after you have taught five years we will

without any further requirements on your part *give* to you the right to have your teachers employment contract renewed from year to year indefinitely, or until you fail to properly conduct yourself as a teacher and retain your efficiency. The words "until such permanent teacher shall have reached the age of sixty-six years", were added to the 1927 law by the 1933 act as indicated in erratum.

It is our contention that the giving or granting of the right to an annually renewable contract of employment is to be distinguished from the contract of employment itself and the right to the continuation of the employment contract is not absorbed by the employment contract and does not become a part thereof.

It is our contention that if the statute has been or had been so drawn as to create contractural rights to permanent tenure subject to cancellation for causes then it would be an unlawful delegation of authority authorizing the township trustee to bind the State so as to fix an unchangable policy of employment with respect to a certain class of teachers to whom such rights would accrue during the pendency of such legislation.

Then our last contention is that if in the interest of public welfare the legislature has the right to limit the right of the contracting trustee to terminate otherwise terminative contracts for the betterment of the educational system that the legislature for the same reason and in the exercise of the police power has the right to enact subsequent legislation effecting such contract if there be a contract.

There was a question about the opinion of the Indiana Supreme Court discussing the annually renewable feature of tenure rights and I point out to the court the opinion on the denial of petition for rehearing found on page 31, of the record, the court says "the original opinion was intended to be understood as ex-

pressing the view that no contractual right to be continued to be a teacher from year to year is involved. The teachers contracts are made for one year, and the terms may be changed annually." And again on page 32, the court said "but, if the relationship were considered as contractual by the rules of private contract, the provision for reemployment from year to year is not enforcable for want of mutuality."

The court said this because if tenure rights are contractual they must be treated as a new and separate contract, because such rights and regulation thereof, are in addition to the usual contract entered into each year, and therefore, the tenure contract, if such this court thinks there is, must stand or fall alone and not be dependent on the consideration expressed in the already existant employment contract.

I have carefully examined the briefs and record in the cases of Dodge vs School Board of City of Chicago, and Phelps vs the Board of Education of West New York cited in respondents brief and find that every question that is raised here was raised in those cases. In the Dodge case the petitioners argued as here that the teacher exchanged a choice of other employment for the security of a pension in her old age, and the Supreme Court of Illinois, answered that contention in the negative in that decision which was sustained by this court.

And we insist that the decision in the Phelps case is absolutely and fundamentally identical to this case, because the statute in New Jersey, provided that after three years employment, that, employment relationship should continue indefinitely, thus, continuing the employment relationship permanently subject to discharge for statutory causes. If the right to the continuation of employment in Indiana be absorbed into the employment contract it is then, likewise, that New Jersey tenure rights would be absorbed in the continuing employment contract, and as this court said, it was not bound by the decision of the state court as to the

existence of a contract, so the only controlling feature of the New Jersey Supreme Court decision was that it did not call tenure rights contractural prior to the Phelps decision.

However, as indicated, the answer to that might be that the Supreme Court of Indiana, determined that such tenure rights were contractual, prior to the present opinion and that we are thus bound by the courts previous decision. I submit that neither the Elwood case or the Kostanzer case will support that contention, in fact, they decide exactly the opposite. The only case which comes dangerously near deciding that tenure rights are contractual is the case Auburn vs Hunt, Vol. 207, Indiana Supreme Court, page 61, when it said "The entire statute, with all its provisions must be read into and considered a part of the contract." However, a further reading of the decision will indicate that the court meant that as long as said statute was in force that the rights granted thereby, would be considered a part of the annual employment contract as to method of discharge or cancellation of that annual employment contract. This was clarified and followed in the instant opinion found on page 32, of the record where the court says "The statutes, the constitution, and the law, must be deemed a part of every teachers contract."

I, further submit to the court as is shown in the petitioner's complaint on page 1, of the record, that her tenure rights accrued by her employment during the 1929-1930 school year, giving credit for services prior to act or 1933-34, when she had no contract because of the dispute about further employment, and that what ever rights accrued, accrued at that time, and that there was no holding by the Supreme Court of Indiana—at that time declaring whether such rights were contractual or otherwise. On this subject I wish to further call the courts attention to the facts as shown on page 3 and 4 of the record. The Elwood case and the Kostanzer cases were both decided after the dispute arose be-

tween the petitioners and respondent as to her tenure rights and that Auburn vs Hunt, supra, was decided after litigation had started.

In conclusion we wish to impress on the court that the Indiana Supreme Court specifically states in its opinion at page 34 of the record that the Phelps case was a case "involving a situation comparable in all substantial respects with the case at bar."

In conclusion we wish to impress on the court that this case is entitled the gravest consideration before the United States Supreme Court should decide that the Indiana Supreme Court was palpably erroneous in their decision.

Respectfully submitted

Raymond Brooks

George C. Gertman

Asa J. Smith of Counsel

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 256

STATE OF INDIANA on the Relation of
DOROTHY ANDERSON,
Petitioner,
vs
HARRY BRAND, Trustee of CHESTER SCHOOL
TOWNSHIP OF WABASH COUNTY, INDIANA

# RESPONDENT'S BRIEF,

## PETITION FOR REHEARING

If I understand the opinion of the majority, it amounts to this. The majority believed that the language used in the 1927 Teachers Tenure Act sufficiently indicated an intention by the legislature not only to circumscribe the limits of the annual employment contract of teachers but also to make a contract on behalf of the State extending and merging it with the effectiveness of that employment contract for the rest of the teacher's life (1937 Act did not provide age limit) except if cancelled for causes as directed by statute.

I take particular issue on one paragraph in the majority opinion found on page 7 (official opinion) as follows, "Until its decision in the present case, the Supreme Court of the State had uniformly held that the teacher's right to continued employment by virtue of the indefinite contract created pursuant to the act was contractual". That statement is entirely the language of the majority opinion and is to be found nowhere in any decision of the Supreme Court of Indiana and this Court cannot point out any such language or statement. True, every decision of our Court on this proposition has held that the emplyoment relationship between the School Corporation and the teacher is contractual and that the giving of the teachers a tenure of employment did not make her an officer as distinguished from an employee. In fact, speaking of plain language, I quote from the quotation embodied in the majority opinion on page 8 (O. Op.), "the duty which the judgement of the trial Court compelled appellants to perform was a duty enjoined by statute and *not by contract.* .....; but the duty *was NOT imposed by ANY PROVISION of the contract.*

What clearer language could our Court have used to indicate, without being called upon to pass directly on this proposition, that the tenure right is purely statutory and not contractual but that the annual employment agreements are contractual and are continually renewable by virtue of the statute.

I also submit that nowhere in the Teachers Tenure Act of 1927 is the *"tenure right"* as distinguished from the contractual rights, called a contract.

As to speaking of the employment contract as an "indefinite contract" in connection with the tenure right, by what other language could the legislature have properly described the indefinitely continuing right of renewal of the annual employment contract? The annual employment contracts were indefinite as to how long they would be annually renewable, as to

compensation, as to school year, and as to teaching position, all of which were variable. The legislature could easily have said and used the term indefinite *TENURE* contract if they so intended, but omitted tenure and called it an indefinite contract, referring to indefiniteness of employment contracts.

We here point out a part of the Teacher Tenure Act of 1927 which has been overlooked by everyone, (Section 4), "No permanent teacher shall be permitted to *cancel his indefinite contract during the school term for which HIS SAID CONTRACT IS IN EFFECT, . .*". What clearer language could have been used to indicate the use of the term "indefinite contract" was intended to refer to the annually renewable employment contracts. If the legislature had intended the term of the 6th year employment contract to merge into a continuing contract of life term, except for cancellation, they would have said—no permanent teacher shall cancel his indefinite *TENURE contract* during any school term, etc.

Also I wish to point out that the first section of the Act provides that by further employment the teacher becomes a permanent teacher automatically by virtue of the statute. The statute does not say that if the trustee employs the teacher the 6th year that he shall enter into a permanent contract to be known as an "indefinite *Tenure* contract" subject to cancellation for causes as provided in the statute. The legislature could have shown that it intended the tenure rights to be contractual beyond doubt. There being a clear doubt this Court should have followed the construction placed on the statute by our Supreme Court and it was error not to do so.

There is a provision for the teacher taking a leave of absence during which time he has no employment contract written or otherwise and yet as long as the statute remained in force he was entitled to have his employment contract renewed at the end of the period of absence by virtue of the statute and not by contract.

The majority said we "accord respectful consideration and great weight to the views of the State Court". We fail to see that it has done so in this case. We cannot see this for the reason that the Indiana Supreme Court obviously could observe that "the word 'contract'" appears ten times in Section 1, . . . ; eleven times in Section 2, . . .; and four times in Section 4, . .. Our Court had before it its own decisions and the decision of this Court in the New Jersey Tenure case yet in effect the majority holds that our Court did not properly construe the very simple language (according to majority opinion) of the tenure statute and even did not properly construe its own previous opinions because we must presume that our Court knows that it would have been bound by previous contrary decisions.

The majority opinion in the Gold cases found legal reasoning to support the view that the government could refuse to meet the expressed obligation of its bonds (undisputed contracts) calling for their payment in gold as against the scathing denunciation of that opinion by the minority of the Court.

The Court says that the New Jersey Tenure case and the Dodge case are not in point because 'statutes did not purport to bind respondents by contract". The statutes there did not do so! Why? Because this Court said so. I thoroughly examined the briefs in both cases and the petitioners in each addressed considerable part of their briefs to the proposition that the statutes in each case did purport to create contracts binding the respondents and in the Dodge case the petitioner urged that the Appellate Courts of Illinois had previously given the teachers pension statutes such a construction. The differences in both fact and law in the New Jersey and Illinois cases are favorable to our position rather than otherwise. In the New Jersey case the Court did not expressly hold that the tenure statute was not contractual but expressly held that the statute

had "the essence of a contractual relation" whereas our Court had never directly passed on the proposition but clearly indicated that it treated the tenure rights as not being contractual in any sense.

We do not here contend that the word "contract" was not used in its usual legal meaning but insist that the legislature was talking about the annual employment contract as distinguished from the statutory tenure rights. The majority opinion holds that the word "contract" as used in the Act was intended by the legislature not only to embrace the annual employment contract but the tenure right to that annual employment contract as well and becoming an integral part of the 6th annual employment contract.

We think it clearly error to disturb the construction placed on the tenure statute by the Indiana Supreme Court unless manifestly and palpably erroneous. This Court has so held in numerous cases.

As to the case of Auburn vs Hunt the contention of the majority was disposed of in respondent supplementary briefs on page 4. All contracts embrace the law of the State.

Disposing of the last contention, we insist that it is quite plausible that it might be wise public policy to provide one method of discharge of teachers in cities and towns and against public policy to provide same method in township schools. In fact it might have been wiser to have reversed the 1933 tenure act in as much as politics more generally enter the picture in the employment and discharge of township teachers and is a relatively small element in the employment and discharge of teachers in cities and towns.

I also wish to call to the attention of the Court the expressed opinion of the Indiana Supreme Court in Stiver et al. V. State ex rel Kent (1 Ne. 2nd., p. 592, opinion by Treanor), wherein they show clearly that the Court had not passed on Tenure rights as such nor as to whether affected by the teachers Tenure Act of

1933. At the bottom of page 593 the Court said; "Whether her Tenure rights were affected by the Act of 1933 is not involved in this case." The Indiana Supreme Court had never passed on the question of whether the Tenure rights were statutory or contractual or what effect the 1933 Act had until its decision in the instant case.

The excerpts from the legislative journal has set out in respondents brief, appendix A pages 35 to 44 showed clearly the intent of the legislature on this subject. The record of the proceedings of the Indiana legislature in enacting the 1933 law clearly answers the question to the majority opinion as to removing limitations on right of discharge by township school corporations and permitting it to remain in the case of cities and towns. The Court knows that it is not always possible to pass legislation as originally intended, being influenced by legislative dickering and lobbies. We also call the Courts attention to the above appendix showing the striking out of the proposed saving clause in the bill as originally passed by the Indiana Senate showing an intention to terminate whatever status had been acquired by township teachers.

The Court did not pass on the proposition 1. page 3 Resp. Br. viz, that the States plenary power cannot be exhausted by exercise, contracted away, alienated nor delegated. If this proposition is good law, and it is amply supported by authority, then to give the teachers tenure act of 1927 the construction placed on it by the majority would make the act invalid ab initio.

It would be impossible (practically) to discharge a teacher under the tenure statute because she did not fit into the school system or classes because of personality, age or other reasons impossible of proof or isolation as legal reasons.

The Court did not pass on proposition 4A and (1) thereunder or point out what binding consideration the teacher gave to secure the additional right of tenure.

The Court pointed out no fundamental difference between the facts in the New Jersey Tenure case, the Dodge pension case and the case at bar. The majority opinion merely recited that there was a difference. The New Jersey Court held tenure rights to have some of the "essence of Contract". The word annuity used in the Illinois statute is a word clearly indicating a contract.

Yet in the face of these contrary decisions in like cases, in the face of the presumption against construing a statute as a contract and the consideration to be given the State Supreme Court the majority opinion strikes down that opinion.

It seems to respondent that the dissenting opinion is unanswerable and that the Court should give that opinion and this petition all possible consideration to support the opinion of the Indiana Supreme Court rather than strike it down.

The respondent feels that the majority opinion is in error and that we have been unable to impress upon the Court the distinctions in construction set forth herein, which can be supported.

WHEREFOR respondent does earnestly pray this Court to reconsider the case at bar, grant a rehearing and further oral argument would be welcomed.

Respectfully Submitted
Raymond Brooks,
Attorney for Respondent

## *CERTIFICATE.*

*I, Raymond Brooks, chief counsel for respondent hereby certify that this petition for rehearing is filed in good faith and not presented for delay.*

Raymond Brooks
*Attorney for Respondent*

*(See Memorandum on Following Page.)*

## MEMORANDUM OF RESULTS OF MAJORITY OPINION

1. It establishes a very dangerous precedent for States whose Constitutions are like ours with regard to education.

2. In Indiana it grants *PERMANENT* contracts to a very small number of teachers—probably not to exceed 150, maybe 200—who will hold their tenure *FOR LIFE,* while all other township teachers are deprived of such privilege.

3. While the number of township teachers who benefit by the decision is so small, yet their several claims thus established will amount in the aggregate to a very large sum, possibly as much as *SEVEN HUNDRED THOUSAND DOLLARS,* which must be raised by taxation in the several townships. If there be only 150 teachers affected, each of them would probably average $3000.00 in salary involved, may be $4000.00, which shows the aggregate amount. And this back pay would be for service *NOT RENDERED.*

4. Furthermore, *ALL* township teachers *ASKED* the repeal of the law, because of the reprisal against them by Trustees who were compelled to protect themselves against the operation of the law.

5. Finally, the decision leaves a situation that is ridiculous in this:

   a. The small group mentioned holds for *LIFE,* unless grounds for dismissal can be established. And the amended law makes no provision for dismissing *TOWNSHIP* teachers.

   b. The group of city and town teachers who had acquired tenure before the 1933 amendment will also *HOLD FOR LIFE,* under this decision, while those city and town teachers who acquire tenure after 1933 will *HOLD ONLY UNTIL* they reach the age of 66 years.

# SUPREME COURT OF THE UNITED STATES.

No. 256.—October Term, 1937.

State of Indiana, ex rel. Dorothy Anderson, Petitioner,
vs.
Harry Brand, Trustee of Chester School Township of Wabash County, Indiana.

On Writ of Certiorari to the Supreme Court of the State of Indiana.

[January 31, 1938.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner sought a writ of mandate to compel the respondent[1] to continue her in employment as a public school teacher. Her complaint alleged that as a duly licensed teacher she entered into a contract in September, 1924, to teach in the township schools and, pursuant to successive contracts, taught continuously to and including the school year 1932-1933; that her contracts for the school years 1931-1932 and 1932-1933 contained this clause: "It is further agreed by the contracting parties that all of the provisions of the Teachers' Tenure Law, approved March 8, 1927, shall be in full force and effect in this contract"; and that by force of that Act she had a contract, indefinite in duration, which could be cancelled by the respondent only in the manner and for the causes specified in the Act. She charged that in July, 1933, the respondent notified her he proposed to cancel her contract for cause; that, after a hearing, he adhered to his decision and the County Superintendent affirmed his action; that, despite what occurred in July, 1933, the petitioner was permitted to teach during the school year 1933-1934 and the respondent was presently threatening to terminate her employment at the end of that year. The complaint alleged the termination of her employment would be a breach of her contract with the school corporation. The respondent demurred on the grounds that (1) the complaint disclosed the matters pleaded had been submitted to the respondent and the County Superintendent who were authorized to try the issues and had lawfully determined them in favor of the respondent; and (2) the Teachers' Tenure

[1] The proceeding was instituted against the respondent's predecessor who then held the office of School Trustee; the respondent was subsequently substituted as defendant. Nothing turns on this substitution and both trustees will be referred to as the respondent.

Law had been repealed in respect of teachers in township schools. The demurrer was sustained and the petitioner appealed to the State Supreme Court which affirmed the judgment.[3] The court did not discuss the first ground of demurrer relating to the action taken in the school year 1932-1933, but rested its decision upon the second, that, by an Act of 1933, the Teachers' Tenure Law had been repealed as respects teachers in township schools; and held that the repeal did not deprive the petitioner of a vested property right and did not impair her contract within the meaning of the Constitution. In its original opinion the Court said: "The relatrix contends . . . that, having become a permanent teacher under the Teachers' Tenure Law before the amendment, she had a vested property right in her indefinite contract, which may not be impaired under the Constitution. The question is whether there is a vested right in a permanent teacher's contract; whether, under the tenure law, there is a grant which cannot lawfully be impaired by a repeal of the statute." Where the state court does not decide against a petitioner or appellant upon an independent state ground, but deeming the federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, this Court has jurisdiction to review the judgment if, as here, it is a final judgment.[5] We cannot refuse jurisdiction because the state court might have based its decision, consistently with the record upon an independent and adequate non-federal ground. And since the amendment of the judiciary act of 1789[4] by the act of February 5, 1867[5] it has always been held this Court may examine the opinion of the state court to ascertain whether a federal question was raised and decided, and whether the court rested its judgment on an adequate non-federal ground.[6] Any am-

[3] — Ind. —, 5 N. E. (2d) 531; on rehearing — Ind. —, 7 N. E. (2d) 777; dissenting opinion of Treanor, J., — Ind. —, 5 N. E. (2d) 913.

[5] Murdock v. City of Memphis, 20 Wall. 590, 635-6; Henderson Bridge Co. v. Henderson, 173 U. S. 592, 608; Rogers v. Hennepin County, 240 U. S. 184, 188-9; Grayson v. Harris, 267 U. S. 352, 358; Virginia v. Imperial Coal Sales Co., 293 U. S. 15, 16; International Steel Co. v. National Surety Co., 297 U. S. 657, 666.

[4] Section 25, 1 Stat. 85.

[5] Section 2, 14 Stat. 385.

[6] Murdock v. City of Memphis, 20 Wall. 590, 633-4; Kreiger v. Shelby R. R. Co., 125 U. S. 39, 44; Bank of Commerce v. Tennessee, 163 U. S. 416, 421; Thompson v. Maxwell Land Grant Co., 168 U. S. 451, 456; Columbia Water Power Co. v. Columbia Elect. St. Ry. &c. Co., 172 U. S. 475, 488-9; Abie State Bank v. Bryan, 282 U. S. 765, 771; Utley v. St. Petersburg, 292 U. S. 106, 111; Fox Film Corp. v. Muller, 296 U. S. 207, 209.

biguity arising from the generality of the court's reference to the Constitution is resolved by a certificate signed by all the Justices of the Court, made a part of the record, to the effect that the reference to the Constitution in the opinion was to Art. I, Sec. 10 of the Constitution of the United States.[7] It thus appearing that the constitutional validity of the repealing act was drawn in question, and the statute sustained, we issued the writ of certiorari.

The court below holds that in Indiana teachers' contracts are made for but one year; that there is no contractual right to be continued as a teacher from year to year; that the law grants a privilege to one who has taught five years and signed a new contract to continue in employment under given conditions; that the statute is directed merely to the exercise of their powers by the school authorities and the policy therein expressed may be altered at the will of the legislature; that in enacting laws for the government of public schools the legislature exercises a function of sovereignty and the power to control public policy in respect of their management and operation cannot be contracted away by one legislature so as to create a permanent public policy unchangeable by succeeding legislatures. In the alternative the court declares that if the relationship be considered as controlled by the rules of private contract the provision for reemployment from year to year is unenforceable for want of mutuality.

As in most cases brought to this court under the contract clause of the Constitution, the question is as to the existence and nature of the contract and not as to the construction of the law which is supposed to impair it. The principal function of a legislative body is not to make contracts but to make laws which declare the policy of the state and are subject to repeal when a subsequent legislature shall determine to alter that policy. Nevertheless, it is established that a legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions within the protection of Article I, Section 10.[8] If the people's representatives deem it in the public interest they may adopt a policy of contracting in respect of public business for a term longer than the life of the current session of the legislature. This the petitioner claims has been done with respect to permanent teachers. The Supreme

[7] International Steel Co. v. National Surety Co., 297 U. S. 657, 662.
[8] New Jersey v. Yard, 95 U. S. 104, 113, 114.

Court has decided, however, that it is the state's policy not to bind school corporations by contract for more than one year.

On such a question, one primarily of state law, we accord respectful consideration and great weight to the views of the State's highest court but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation.[9] This involves an appraisal of the statutes of the State and the decisions of its courts.

The courts of Indiana have long recognized that the employment of school teachers was contractual and have afforded relief in actions upon teachers' contracts.[10] An Act adopted in 1899[11] required all contracts between teachers and school corporations to be in writing, signed by the parties to be charged, and to be made a matter of public record. A statute of 1921[12] enacted that every such contract should be in writing and should state the date of the beginning of the school term, the number of months therein, the amount of the salary for the term, and the number of payments to be made during the school year.

In 1927 the State adopted the Teachers' Tenure Act[13] under which the present controversy arises. The pertinent portions are copied in the margin.[14] By this Act it was provided that a teacher who

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[9] Phelps *v.* Board of Education, 300 U. S. 319, 322, and cases cited.

[10] City of Crawfordsville *v.* Hays, 42 Ind. 200; Charlestown School Twp. *v.* Hay, 74 Ind. 127; Harrison School Twp. *v.* McGregor, 96 Ind. 185; Kiefer *v.* Troy School Twp., 102 Ind. 279; Sparta School Twp. *v.* Mendell, 138 Ind. 188, 37 N. E. 604; School City of Lafayette *v.* Bloom, 17 Ind. App. 461, 46 N. E. 1016; Henry School Twp. *v.* Meredith, 32 Ind. App. 607, 70 N. E. 393; Gregg School Twp. *v.* Hinshaw, 76 Ind. App. 503, 132 N. E. 586.

[11] Act of Feb. 28, 1899, G. L. Inc. 1899, p. 173, Burns' Ind. Stat. Ann. 1933, Secs. 28-4302 and 28-4303.

[12] Act of March 7, 1921; Acts of 1921, p. 195; Burns' Ind. Stat. Ann. 1933, Sec. 28-4304.

[13] Act of March 8, 1927; Acts of 1927, p. 259, Burns' Ind. Stat. Ann. Supp. 1929, Sec. 6967.1.

[14] "Section 1. Be it enacted by the general assembly of the State of Indiana, That any person who has served or who shall serve under contract as a teacher in any school corporation in the State of Indiana for five or more successive years, and who shall hereafter enter into a teacher's contract for further service with such corporation, shall thereupon become a permanent teacher of such school corporation. . . . Upon the expiration of any contract between such school corporation and a permanent teacher, such contract shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract. Such an indefinite contract shall remain in force unless succeeded by a new contract signed by both parties or unless it shall be cancelled as provided in section 2 of this act: *Provided*, That teach-

has served under contract for five or more successive years, and thereafter enters into a contract for further service with the school corporation, shall become a permanent teacher and the contract, upon the expiration of its stated term, shall be deemed to continue in effect for an indefinite period, shall be known as an indefinite contract, and shall remain in force unless succeeded by a new contract or cancelled as provided in the Act. The corporation may cancel the contract, after notice and hearing, for incompetency, insubordination, neglect of duty, immorality, justifiable decrease in the number of teaching positions, or other good or just cause, but not for political or personal reasons. The teacher may not cancel the contract during the school term nor for a period thirty days previous to the beginning of any term (unless by mutual agreement) and may cancel only upon five days' notice.

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ers' contracts shall provide for the annual determination of the date of beginning and length of school terms by the school corporation: and, *Provided, further,* That teachers' contracts may contain provisions for the fixing of the amount of annual compensation from year to year by a salary schedule adopted by the school corporation and such schedule shall be deemed to be a part of such contract; and, *Provided, further,* That such schedule may be changed by such school corporation on or before May 1st of any year, such changes to become effective at the beginning of the following school year: *Provided,* That all teachers affected by such changes shall be furnished with printed copies of such changed schedule within thirty days after its adoption.

"Sec. 2. Any indefinite contract with a permanent teacher as defined in section 1 of this act may be cancelled only in the following manner: Not less than thirty days nor more than forty days before the consideration by any school corporation of the cancellation of any such contract, such teacher shall be notified in writing of the exact date, time when and place where such consideration is to take place; and such teacher shall be furnished a written statement of the reasons for such consideration, within five days after any written request for such statement; and such teacher shall, upon written request for a hearing, filed within fifteen days after the receipt by said teacher of notice of date, time and place of such consideration, be given such a hearing before the school board, in the case of cities and towns, and before the township trustee, in the case of townships; such hearing shall be held not less than five days after such request is filed and such teacher shall be given not less than five days' notice of the time and place of such hearing. Such teacher, at the hearing, shall have a right to a full statement of the reasons for the proposed cancellation of such contract, and shall have a right to be heard, to present the testimony of witnesses and other evidence bearing upon the reasons for the proposed cancellation of such contract. No such contract shall be cancelled until the date set for consideration of the cancellation of such contract; nor until after a hearing is held, if such hearing is requested by said teacher; nor until, in the case of teachers, supervisors, and principals, the city or town superintendents, in cities and towns, and the county superintendents, in townships and in cities and towns not having superintendents, shall have given the school corporation his recommendations thereon, and it shall be the duty of such superintendent to present such recommendations upon five days' written notice to him by such school corporation. . . . Cancellation of an indefinite contract of a permanent teacher may be made for incompetency, insubordination (which shall be deemed to mean a wilful refusal to obey the school laws of this state or reasonable rules prescribed for the gov-

By an amendatory Act of 1933[15] township school corporations were omitted from the provisions of the Act of 1927. The court below construed this Act as repealing the Act of 1927 so far as township schools and teachers are concerned and as leaving the respondent free to terminate the petitioner's employment. But we are of opinion that the petitioner had a valid contract with the respondent, the obligation of which would be impaired by the termination of her employment.

Where the claim is that the State's policy embodied in a statute is to bind its instrumentalities by contract, the cardinal inquiry is as to the terms of the statute supposed to create such a contract. The State long prior to the adoption of the Act of 1927 required the execution of written contracts between teachers and school corporations, specified certain subjects with which such contracts must deal, and required that they be made a matter of public record. These were annual contracts, covering a single school term. The Act of 1927 announced a new policy that a teacher who had served for five years under successive contracts, upon the execution of another was to become a permanent teacher and the last contract was to be indefinite as to duration and terminable by either party only upon compliance with the conditions set out in the statute. The policy which induced the legislation evidently was that the teacher should have protection against the exercise of the right, which would otherwise inhere in the employer, of terminating the employment at the end of any school term without assigned reasons

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ernment of the public schools of such corporation), neglect of duty, immorality, justifiable decrease in the number of teaching positions or other good and just cause, but may not be made for political or personal reasons: . . .

". . . .

"Sec. 4. No permanent teacher shall be permitted to cancel his indefinite contract during the school term for which his said contract is in effect nor for a period of thirty (30) days previous to the beginning of such school term unless such cancellation is mutually agreed upon; such permanent teacher shall be permitted to cancel his indefinite contract at any other time by giving a five days' notice to the school corporation. Any permanent teacher cancelling his indefinite contract in any other manner than in this section provided shall be deemed guilty of unprofessional conduct and the state superintendent is hereby authorized to suspend the license of such teacher for a period of not exceeding ing one year.

". . . .

"Sec. 6. This act shall be construed as supplementary to an act of the general assembly, page 195, acts 1921, entitled, 'An act concerning teachers' contracts and providing for the repeal of conflicting laws.'"

[15] Act of March 1, 1933, Acts of 1933, p. 716, Burns' Ind. Stat. Ann. 1933, Sec. 28-4307.

and solely at the employer's pleasure. The state courts in earlier cases so declared.[16]

The title of the Act is couched in terms of contract. It speaks of the making and cancelling of indefinite contracts. In the body the word "contract" appears ten times in Section 1, defining the relationship; eleven times in Section 2, relating to the termination of the employment by the employer, and four times in Section 4, stating the conditions of termination by the teacher.

The tenor of the Act indicates that the word "contract" was not used inadvertently or in other than its usual legal meaning. By Section 6 it is expressly provided that the Act is a supplement to that of March 7, 1921, *supra*, requiring teachers' employment contracts to be in writing. By Section 1 it is provided that the written contract of a permanent teacher "shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract." Such an indefinite contract is to remain in force unless succeeded by a new contract signed by both parties or cancelled as provided in Section 2. No more apt language could be employed to define a contractual relationship. By Section 2 it is enacted that such indefinite contracts may be cancelled by the school corporation only in the manner specified. The admissible grounds of cancellation, and the method by which the existence of such grounds shall be ascertained and made a matter of record, are carefully set out. Section 4 permits cancellation by the teacher only at certain times consistent with the convenient administration of the school system and imposes a sanction for violation of its requirements. Examination of the entire Act convinces us that the teacher was by it assured of the possession of a binding and enforceable contract against school districts.

Until its decision in the present case the Supreme Court of the State had uniformly held that the teacher's right to continued employment by virtue of the indefinite contract created pursuant to the Act was contractual.

In *School City of Elwood* v. *State, ex rel. Griffin et al.*, 203 Ind. 626, 180 N. E. 471, it was said (p. 634):

"The position of a teacher in the public schools is not a public office, but an employment by contract between the teacher and the

[16] Ratcliff v. Dick Johnson School Twp., 204 Ind. 525, 185 N. E. 143; Kostanzer v. State, 205 Ind. 536, 187 N. E. 337; State v. Stout, 206 Ind. 58, 187 N. E. 267; Arburn v. Hunt, 207 Ind. 61; 191 N. E. 148.

school corporation. The relation remains contractual after the teacher has, under the provisions of a teachers' tenure law, become a permanent teacher—but the terms and conditions of the contract are thereafter governed primarily by the statute."

In *Kostanzer* v. *State,* 205 Ind. 536, 187 N. E. 337, an action in mandate to compel reinstatement of a discharged teacher, it was said (p. 547):

"If appellee's position is not an office appellants insist that mandamus is not available for the reason that the granting of mandatory relief results in enforcing a purely contractual right. It is true that mandatory relief against appellants will result in enforcing appellee's rights under her contract; but the duty which the judgment of the trial court compelled appellants to perform was a duty enjoined by statute and not by contract. The contract between appellants and appellee created a relation which entitled appellee to have appellants perform the duty in question; but the duty was not imposed by any provision of the contract."

And in the same case it was also said (pp. 548-49):

"The tenure act permits a teacher to cancel his contract at any time after the close of a school term up to thirty days prior to the beginning of the next school term, provided five days' notice is given, and appellant contends that there was no contract between appellee and appellants for the reason 'that a contract which does not bind both parties binds neither of them.' This proposition is undoubtedly supported by the law of contracts. But there is nothing in the law of contracts to prevent one party to a contract granting to the other the privilege of rescission or cancellation on terms not reserved to the former party. The local school corporations are agents of the state in the administration of the public schools and the General Assembly has the power to prescribe the terms of the contract to be executed by these agents."

In *State* v. *Board of School Commissioners of Indianapolis,* 205 Ind. 582, 187 N. E. 392, an action in mandate to compel reinstatement of a discharged teacher, the court referred to the indefinite contract of a permanent teacher and held that it remained in full force and effect until succeeded by a new contract or cancelled as provided in Section 2 of the Act.

In *Arburn* v. *Hunt,* 207 Ind. 61, 191 N. E. 148, it is said: "The source of authority for the so-called permanent teacher's contract is the statute. The legislature need not have provided for such contracts, but, since it did so provide, the entire statute, with all of its provisions, must be read into and considered as a part of the contract."

We think the decision in this case runs counter to the policy evinced by the Act of 1927, to its explicit mandate and to earlier decisions construing its provisions. Also that the decision in *Phelps v. Board of Education*, 300 U. S. 319 that the Act there considered did not create a contract, is not, as the court below suggests, authority for a like result here. *Dodge* v. *Board of Education*, 302 U. S. 74, on which the respondent relies is distinguishable, because the statute there involved did not purport to bind the respondent by contract to the payment of retirement annuities, and similar legislation in respect of other municipal employees had been consistently construed by the courts as not creating contracts.

The respondent urges that every contract is subject to the police power and that in repealing the Teachers' Tenure Act the legislature validly exercised that reserved power of the state. The sufficient answer is found in the statute. By Section 2 of the Act of 1927 power is given to the school corporation to cancel a teacher's indefinite contract for incompetency, insubordination (which is to be deemed to mean wilful refusal to obey the school laws of the state or reasonable rules prescribed by the employer), neglect of duty, immorality, justifiable decrease in the number of teaching positions or other good and just cause. The permissible reasons for cancellation cover every conceivable basis for such action growing out of a deficient performance of the obligations undertaken by the teacher, and diminution of the school requirements. Although the causes specified constitute in themselves just and reasonable grounds for the termination of any ordinary contract of employment, to preclude the assumption that any other valid ground was excluded by the enumeration, the legislature added that the relation might be terminated for any other good and just cause. Thus in the declaration of the state's policy, ample reservations in aid of the efficient administration of the school system were made. The express prohibitions are that the contract shall not be cancelled for political or personal reasons. We do not think the asserted change of policy evidenced by the repeal of the statute is that school boards may be at liberty to cancel a teacher's contract for political or personal reasons. We do not understand the respondent so to contend. The most that can be said for his position is that, by the repeal, township school corporations were again put upon the basis of annual contracts, renewable at the pleasure of the board. It is significant that the Act of 1933 left

the system of permanent teachers and indefinite contracts untouched as respects school corporations in cities and towns of the state. It is not contended, nor can it be thought, that the legislature of 1933 determined that it was against public policy for school districts in cities and towns to terminate the employment of teachers of five or more years' experience for political or personal reasons and to permit cancellation, for the same reasons, in townships.

Our decisions recognize that every contract is made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power but we have repeatedly said that, in order to have this effect, the exercise of the power must be for an end which is in fact public and the means adopted must be reasonably adapted to that end,[17] and the Supreme Court of Indiana has taken the same view in respect of legislation impairing the obligation of the contract of a state instrumentality.[18] The causes of cancellation provided in the Act of 1927 and the retention of the system of indefinite contracts in all municipalities except townships by the Act of 1933 are persuasive that the repeal of the earlier act by the later was not an exercise of the police power for the attainment of ends to which its exercise may properly be directed.

As the court below has not passed upon one of the grounds of demurrer which appears to involve no federal question, and may present a defense still open to the respondent, we reverse the judgment and remand the cause for further proceedings not inconsistent with this opinion.

*So ordered.*

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

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[17] Home Bldg & Loan Asso. *v.* Blaisdell, 290 U. S. 398, 438; Worthen Co. *v.* Thomas, 292 U. S. 426, 431, 432; Worthen Co. *v.* Kavanaugh, 295 U. S. 56, 60; Treigle *v.* Acme Homestead Asso., 297 U. S. 189, 197.

[18] Central Union Tel. Co. *v.* Indianapolis Tel. Co., 189 Ind. 210, 126 N. E. 628; Downing *v.* Indiana State Board of Agriculture, 129 Ind. 443, 28 N. E. 123.

# SUPREME COURT OF THE UNITED STATES.

No. 256.—October Term, 1937.

State of Indiana on the Relation of Dorothy Anderson, Petitioner,
*vs.*
Harry Brand, Trustee of Chester School Township of Wabash County, Indiana.

On Writ of Certiorari to the Supreme Court of the State of Indiana.

[January 31, 1938.]

Mr. Justice Black, dissenting.

In my opinion this reversal unconstitutionally limits the right of Indiana to control Indiana's public school system. I believe the judgment should be affirmed because:

(1) It does not appear in the record that a federal question was necessarily involved in the decision of the State court;[1]

(2) The record does not disclose beyond a reasonable doubt[2] that Indiana, by the Teachers Act of 1927, surrendered its sovereign, governmental right to change and alter at will legislative policy related to the public welfare, or that its legislature had the power to do so.

*First.* It does not appear from the record that a federal question "was necessarily involved in the decision; and that the state court could not have given the judgment or decree, which they passed, without deciding it."[3] Therefore, "it is a matter of no consequence to us that the court may have gone further and decided a federal question."[4] "Where a case in this Court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons."[5]

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[1] Moore *v.* Mississippi, 21 Wall. 636, 639.

[2] Cf. Ogden *v.* Saunders, 12 Wheat. 213, 270.

[3] Armstrong, et al. *v.* The Treasury of Athens County, 16 Pet. 281, 285.

[4] Moore *v.* Mississippi, *supra.*

[5] Siler *v.* L. & N. R. R. Co., 213 U. S. 175, 193.

Petitioner's complaint disclosed: that, after a hearing, she was removed from her position as a teacher for causes including those set out in the statute, i. e., (1) "neglect of duty" and (2) "for other good and just cause"; and that the county superintendent, on appeal, approved her removal. A demurrer was sustained to the complaint. The demurrer assigned the general ground that the complaint failed to "state facts sufficient to constitute a good cause of action." One of the specific reasons set out for demurrer was that the complaint showed on its face that petitioner had been removed only after a proper notice and hearings before the township trustee and the county superintendent, in accordance with the requirements of the Act.

Under these circumstances, we can consider the decision of the Indiana courts as based on a finding of inadequacy in petitioner's complaint under Indiana law. This Court does not decide "questions of a constitutional nature unless absolutely necessary to a decision of the case."[6] We should not depart from this policy in order to strike down a law passed by a state in its sovereign capacity to establish legislative policies for the education of its people.

*Second.* This Court has declared that " . . . neither the (Fourteenth) amendment . . . nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote . . . education . . . of the people . . ."[7] Article 8, Section 1 of the Constitution of Indiana provides: "knowledge and learning, generally diffused throughout a community, being essential to the preservation of free government; it shall be the duty of the general assembly . . . to provide, by law, for a general and uniform system of common school, wherein tuition shall be without charge, equally open to all." In carrying out this constitutional mandate to provide education for the people of the State, the legislature of Indiana has found it necessary—as have other States—to alter legislative policy from time to time. The statutes and the decisions of Indiana indicate a laudable desire and a commendable

[6] Burton *v.* United States, 196 U. S. 295; "If the experience of one hundred and fifty years of constitutional interpretation has taught any lesson, it is the unwisdom of making solemn declarations as to the meaning of that instrument which are unnecessary to decision. They can serve no useful purpose and their only effect may be to embarrass the Court when decision becomes necessary. O'Donoghue *v.* United States, 289 U. S. 516, 550; Humphrey's Executor *v.* United States, 295 U. S. 602, 626-627," Stone, J., Dissenting, David A. Wright, Petitioner, *v.* The United States, No. 37, October Term, 1937.

[7] Barbier *v.* Connolly, 113 U. S. 27, 31.

effort not only to provide sufficient funds to carry out these educational aspirations of the State, but also to provide reasonable security of employment for teachers. Such effort brought about the "Indiana Teachers Tenure Act of 1927." This law provided the conditions upon which "permanent" teachers with "indefinite contracts" could be removed from their positions, and was evidently intended to provide statutory security against their discharge by local school authorities for any causes except those specified in the law. These "permanent" teachers could cancel their "indefinite contracts" upon five days notice at any time except during the school term or for a period of thirty days previous to it.

In 1933, the legislative representatives of the people of Indiana decided to change this policy by excluding township school corporations from its operation. The contention here is that the statutory tenure given teachers under the 1927 Act amounted to contracts with the state which could not be impaired by repeal or modification of the law.

The Indiana Supreme Court has consistently held, even before its decision in this case, that the right of teachers, under the 1927 Act, to serve until removed for cause, was *not given by contract, but by statute.* Such was the express holding in the two cases cited in the majority opinion: *Kostanzer* v. *State,* 205 Ind. 536; and *Elwood* v. *State,* 203 Ind. 626.

In *Kostanzer* v. *State, supra,* a teacher filed petition for *mandamus* alleging removal contrary to the "indefinite contract" obligation under the Act of 1927. Mandamus was opposed as an improper remedy because the teachers sought to compel action under a teachers tenure *"contract."* Denying the contention that the teacher's rights were fixed by *contract,* the Supreme Court of Indiana said:

"But the duty which the judgment of the trial court compelled appellants to perform was a duty enjoined by statute *and not by contract. . . . the duty was not imposed by any provision of the contract.* In *School City of Elwood* v. *State ex rel Griffin, supra,* this same contention was disposed of in the following language: *'It is because of appellee's right under this statute* . . . ; that mandamus is the proper remedy in this case . . . ; a public school teacher who, *under a positive provision of the statute, has a fixed tenure of employment or can be removed only in a certain manner*

***prescribed by the statute, is entitled to reinstatement if he has been removed from his position in violation of his statutory right.'"***

These cases demonstrate that the Supreme Court of Indiana has uniformly held that teachers did not hold their "indefinite" tenure under *contract*, but by grant of a repealable statute. In order to hold in this case that a contract was impaired, it is necessary to create a contract unauthorized by the Indiana legislature and declared to be non-existent by the Indiana Supreme Court.

In the similar case of *Phelps* v. *Board of Education*, 300 U. S. 323, coming to this Court from New Jersey, the Supreme Court of that State declared that:

"*The status of tenure teachers, while in one sense perhaps contractual, is in essence dependent on a statute,* . . . which the legislature at will may abolish, or whose emoluments it may change."

Under the New Jersey Act, which appears in the margin,[8] teachers could serve during "good behavior and efficiency" and subject to removal only after a hearing and for cause. The Supreme Court of New Jersey declared that the *tenure* of New Jersey teachers was "*in one sense* perhaps contractual." The Supreme Court of Indiana declared that the *tenure of Indiana teachers was not contractual.* Yet this Court in the case of *Phelps* v. *Board of Education, supra,* decided that New Jersey's discharge of its teachers employed by the State "'in a sense perhaps contractual" did not impair their contracts. The Court now strikes down Indiana's Teachers Tenure Law after repeated decisions by the State's Supreme Court that the teachers tenure is *not contractual.* The intent of the New Jersey Act and the intent of the Indiana Act were evidently identical and in view of this fact, I believe that the decision on the New Jersey appeal and the majority decision on the Indiana appeal are irreconcilable.

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[8] The New Jersey Act (as quoted in Phelps v. Board of Education of Town of West New York, 57 Sup. Ct. Rep. 483).

Section 1 (4 N. J. Com. St. 1910). The service of all teachers, principals, supervising principals of the public schools in any school district of this state shall be *during good behavior and efficiency, after the expiration of a period of employment of three consecutive years in that district,* unless a shorter period is fixed by the employing board; . . . *No* principal or *teacher shall be dismissed* or subjected to reduction of salary in said school district *except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge* of the cause or causes shall have been preferred against him or her . . . and after the charge shall have been examined into and found true in fact by said Board of Education, *upon reasonable notice to the person charged,* who may be represented by counsel at the hearing. . . .

The Act of 1927 certainly does not clearly establish that the people of Indiana intended to surrender their sovereign right to change their educational policies from time to time to meet new needs or changed conditions. Under these circumstances "The presumption is that such a law (Teachers Tenure Law) is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise."[9]

It is the end of every government to promote the general welfare of its people and we do not assume *"that the government intended to diminish its power of accomplishing the end for which it was created."*[10]

The Supreme Court of Indiana here held that "the Tenure Law does not purport to give a teacher a *definite* and permanent contract. The word '*indefinite*' is used in the statute itself. . . . The Tenure Statute was only intended as a limitation upon the plenary power of local school officials to cancel contracts. . . . It was not intended as, *and cannot be,* a limitation upon the power of future legislatures to change the law respecting teachers and their tenures. These are matters of public policy, of purely governmental concern, in which the legislative power cannot be exhausted or consumed, or contracted away, so as to limit the discretion of future general assemblies."[11]

Prior to this decision and even before the 1927 Act, the Supreme Court of Indiana had said:

"With that (legislative) determination (relating to educational matters) the *judiciary can no more rightfully interfere than can the legislature with a decree of judgment pronounced by a judicial tribunal.* . . . As the power over schools is a legislative one it is not exhausted by exercise. The legislature having tried one plan is not precluded from trying another. It has a choice of methods, and may change its plans as often as it deems necessary or expedient; *and for mistakes or abuses it is answerable to the people, but not to the court.*"[12]

The clear purport of Indiana law is that its legislature cannot surrender any part of its plenary constitutional right to repeal, alter or amend existing legislation relating to the school system

[9] Dodge v. Board of Education of Chicago, et al., 302 U. S. 74, 79.
[10] Charles River Bridge v. The Warren Bridge, 11 Pet. 547.
[11] 5. N. E. (2d) 531, 532.
[12] State ex rel. Clark v. Haworth, 122 Indiana 462.

whenever the conditions demand change for the public good. Under Indiana law the legislature can neither barter nor give away its constitutional investiture of power. It can make no contract in conflict with this sovereign power. The construction of the constitution of Indiana by the Supreme Court of Indiana *must be accepted as correct.* That court holds that Indiana's Constitution invests Indiana's legislature with *continuing* power to change Indiana's educational policies. It has here held that the legislature did not attempt or intend to surrender its constitutional power by authorizing *definite* contracts which would prevent the future exercise of this continuing, constitutional power. If the constitution and statutes of Indiana, as construed by its Supreme Court, prohibit the legislature from making a contract which is inconsistent with a continuing power to legislate, there could have been no *definite* contracts to be impaired. "The contracts designed to be protected by the (Federal Constitution) . . . are contracts by which *perfect rights, certain, definite, fixed, private rights of property, are vested.* . . . It follows, then, upon principle, that in every perfect or competent government, there must exist a general power to enact and to repeal laws; and to create and change or discontinue, the agents designated for the execution of those laws."[13]

Merits of a policy establishing a permanent, teacher tenure law are not for consideration here. We are dealing with the constitutional right of the people of a sovereign state to control their own public school system as they deem best for the public welfare. This Court should neither make it impossible for states to experiment in the matter of security of tenure for their teachers, nor deprive them of the right to change a policy if it is found that it has not operated successfully.

The Indiana Constitution gives the State legislature *complete authority* to control the public school system. The State Supreme Court declares that under this authority the legislature can change school plans as often as it believes a change will promote the interest of education "*and for mistakes or abuses it is answerable to the people, but not to the Court.*"[14] I believe the people of Indiana, if they prefer, have the right under the Federal Constitution to entrust this important public policy to their elective representa-

[13] Butler et al. *v.* Pennsylvania, 10 Howard 402, 416.

[14] State ex rel. Clark *v.* Haworth, supra.

tives rather than to the courts. Democracy permits the people to rule. I cannot agree that the constitutional prohibition against impairment of contracts was intended to—or does—transfer in part the determination of the educational policy of Indiana from the legislature of that State to this Court.

Indiana, in harmony with our national tradition, seeks to work out a school system, offering education to all, as "essential to the preservation of free government." That great function of an advancing society has heretofore been exercised by the states. I find no constitutional authority for this Court to appropriate that power. Indiana's highest court has said that the *State did not*, and has strongly indicated that the *legislature could not*, make contracts with a *few citizens*, that would take away from *all the citizens*, the continuing power to alter the educational policy for the best interests of Indiana school children. The majority decision now places in this Court a power which has been exercised by the states since the adoption of our Constitution. The people have not surrendered that power to this Court by constitutional amendment.

For these reasons I cannot agree to the majority decision and I believe the judgment of the Supreme Court of Indiana should be affirmed.